TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWLING, HIS NEXT FRIEND.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 4, 1914.

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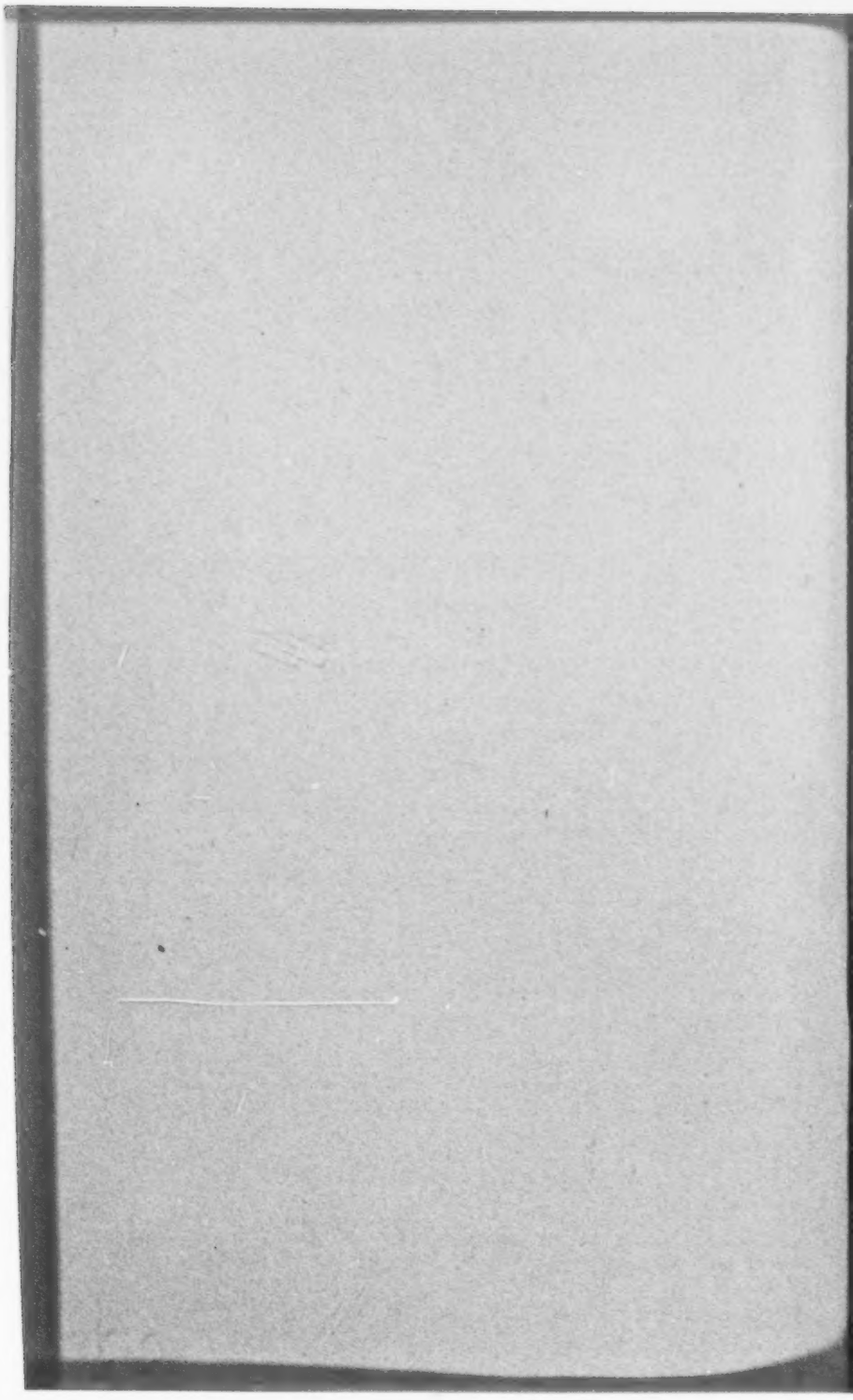

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1-2 Supreme Court of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Error to Court of Appeals, Franklin County, O.

RECORD.

Arnold & Game and W. Wilson Carlisle, Attorneys for Plaintiff in Error.

Fred M. McSweeney, Wilson & Rector, Attorneys for Defendant in Error.

Filed Apr. 21, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

3 In the Supreme Court of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Petition in Error.

[Filed March 31, 1914.]

Plaintiff in error says that at the January Term, to wit, on the twenty-eighth day of March, 1914, of the Court of Appeals of Franklin county, Ohio, the defendant in error, Harry O. Blagg, by Joseph M. Downing, his next friend, recovered a judgment upon the consideration of said court against the plaintiff in error, The Jeffrey Manufacturing Company, in cause number 139 pending in said court, wherein plaintiff in error was plaintiff in error and defendant in error was defendant in error, a transcript of the docket and
4 journal entries whereof, together with all the original papers and bill of exceptions embodying all the evidence are filed herewith.

There is error in said record and proceedings in this, to wit:

First. Said Court of Appeals erred in finding that the Court of Common Pleas of Franklin County, Ohio, did not err at the trial of this cause in said Court of Common Pleas in refusing to give to the

jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury, to which the plaintiff in error at the time excepted.

Second. Said Court of Appeals erred in finding that said Court of Common Pleas did not err at the trial of this cause in charging the jury that the provisions of the socalled Ohio Workmen's Compensation Law (being the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the governor June 15, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to," etc., 102 Ohio Laws, 524), was the law of the State of Ohio and was in force and operation at the time of the injuries complained of by the defendant in error, and that by virtue of the provisions of said pretended law all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment and who did not pay into the state insurance
5 fund the premium provided by said pretended law should be liable to their employes for damages suffered by reason of personal injuries sustained in the course of the employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes, that plaintiff in error could not avail itself of the common law defenses of assumption of risk, fellow servant rule and contributory negligence rule, and that said defenses of assumption of risk, fellow servant rule and contributory negligence could not operate as defenses for the plaintiff in error in this cause.

Third. Said Court of Appeals erred in finding that said Court of Common Pleas at the trial of this cause did not err in charging the jury that said act of the General Assembly of the State of Ohio, passed May 31, 1911, and approved by the governor June 15, 1911, (102 Ohio Laws, 524) was a valid law and was not in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by virtue of said pretended law the plaintiff in error could not avail itself of the first and second defenses set forth in its answer upon which this cause was tried in said Court of Common Pleas, to wit, the defenses of assumption of risk, fellow servant rule and contributory negligence.

Fourth. Said Court of Appeals erred in finding that said Court of Common Pleas did not err in the trial of said cause in the
6 respects hereinbefore set forth, and in affirming the judgment of said Court of Common Pleas and remanding this cause to said Court of Common Pleas for execution.

Plaintiff in error therefore prays that said judgments of said Court of Appeals and said Court of Common Pleas may be reversed and set aside; that this cause be remanded to said Court of Common Pleas for further proceedings, and that it be restored to all things which it has lost by reason thereof.

ARNOLD & GAME AND
W. WILSON CARLISLE,
Attorneys for Plaintiff in Error.

Precipe.

COLUMBUS, OHIO, March 31, 1914.

To the Clerk:

Issue summons in error for the within named defendant in error to the sheriff of Franklin county, Ohio, returnable according to law.

ARNOLD & GAME.
W. WILSON CARLISLE,
Attorneys for Plaintiff in Error.

7 In the Court of Appeals, Franklin County, Ohio.

[No. 139.]

THE JEFFREY MANUFACTURING COMPANY, Plaintiff,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant.

Transcript of Docket and Journal Entries.

1914, January 14. Petition in error filed.
1914, January 14. Precipe filed: summons issued to sheriff of Franklin county, Ohio: returnable January 26, 1914.
1914, January 14. Transcript docket and journal entries filed.
1914, January 14. Thirty-five original papers filed.
1914, January 26. Bill of exceptions filed.
1914, January 31. Three briefs and receipt on behalf of plaintiff in error filed.
1914, February 16. Three briefs and receipt for defendant in error filed.
1914, February 16. Motion to advance filed.
1914, February 16. Affidavit in support of motion to advance filed.
8 1914, March 28. Judgment affirmed as per entry. 1-139.
1914, March 28. Mandate issued. 3-234.

Journal Entry.

March 28, 1914. The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said The Jeffrey Manufacturing Company, plaintiff in error herein, together with the bill of exceptions, original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Franklin county, Ohio, filed therewith in the said court, wherein Harry O. Blagg, by Joseph M. Downing, his next friend, was plaintiff, and The Jeffrey Manufacturing Company was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court

find that there is no error manifest upon the face of the record or said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said Court of Common Pleas in said case in favor of the said defendant in error, and against the said plaintiff in error, be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, and in
9 default thereof that execution issue therefore.

Ordered, that a special mandate be sent to the Court of Common Pleas of Franklin county, to carry this judgment into execution.

To all of said ruling, order and judgment plaintiff in error excepts.

[Duly certified.]

Petition in Error.

[Filed January 14, 1914.]

The plaintiff in error states that at the September Term, 1913, to wit, on the twenty-ninth day of December, 1913, of the Court of Common Pleas of Franklin county, Ohio, in case No. 65,292 pending in said court the defendant in error, Harry O. Blagg, by Joseph M. Downing, his next friend, recovered a judgment upon consideration of said court against the plaintiff in error, The Jeffrey Manufacturing Company, in an action then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of the docket and journal entries whereof, together with the original papers and bill of exceptions embodying all the evidence, are filed herein.

There is error in said record and proceedings in this, to wit:

First. Said Court erred in overruling the motion of plaintiff in error for a new trial.

Second. Said court erred in refusing to give separately to the jury the several and respective written instructions requested by
10 the plaintiff in error to be given to the jury before the arguments of counsel on the trial of said cause.

Third. Said court erred in its charge to the jury on the trial of said cause.

Fourth. Said court erred in charging the jury that under the provisions of the Ohio Workmen's Compensation Law, being the act of the General Assembly of the State of Ohio approved June 15, 1911 (102 Ohio Laws, 524), to the effect that the plaintiff in error could not avail itself of the first and second defenses set forth in its answer herein, and that the same could not operate as defenses herein, for the reason that said act is invalid and void, and the provisions thereof removing the defenses of the assumption of risk, fellow servant rule and contributory negligence are void, as violating the provisions of

the Constitution of the State of Ohio and the several and respective amendments thereof and thereto, and the provisions of the Constitution of the United States and of the several respective amendments thereof and thereto.

Fifth. Said court erred in other particulars manifest on the face of the record to the prejudice of the plaintiff in error.

Plaintiff in error therefore prays that said judgment of said Court of Common Pleas may be reversed and that it be restored to all rights which it has lost by reason thereof.

W. WILSON CARLISLE AND
ARNOLD & GAME,
Attorneys for Plaintiff in Error.

11 *Precipe.*

COLUMBUS, OHIO, January 16, 1914.

To the Clerk:

Issue summons in error for the above named defendant in error, indorsed and returnable according to law.

W. WILSON CARLISLE AND
ARNOLD & GAME,
Attorneys for Plaintiff in Error.

Opinion.

* * * * * * *

As to the unconstitutionality of the Ohio Workmen's Compensation Law, while fully argued in his brief, counsel for plaintiff in error frankly stated that he expected no relief in this court. On this question we are bound by the decision of our highest state tribunal, which has decided this question in the case of State ex rel. v. Creamer, 85 O. S., 349.

* * * * * * *

12 In the Court of Common Pleas, Franklin County, Ohio.

[No. 65292.]

HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend,
Plaintiff,
vs.
THE JEFFREY MANUFACTURING COMPANY, Defendant.

Transcript of Docket and Journal Entries.

1913, May 6. Petition, affidavit and precipe filed; summons issued to sheriff Franklin county, Ohio; returnable May 19; answer June 7, 1913.

1913, June 7. Answer filed.

1913, November 5. Plaintiff permitted to amend petition as entry. 173-142.

1913, November 24. Motion of defendant filed.

1913, November 24. Affidavit of W. A. Givens filed.

1913, November 24. Diltz appointed official stenographer. 167-414.

1913, November 24. Jury impaneled and sworn. 167-414.

1913, November 24. Reply filed.

1913, November 25. Eight (8) requests for defendant filed.

13 1913, November 25. Trial concluded; verdict for plaintiff for $25,000. 167-415.

1913, November 26. Stenographer's certificate filed, $8.

1913, November 28. Motion for new trial filed.

1913, December 1. Affidavit of Geo. Steinman filed.

1913, December 29. Motion for new trial overruled; judgment for plaintiff for $16,000; exceptions. 167-454.

1913, December 31. Precipe filed; Fi. Fa. issued sheriff Franklin county, Ohio. 31-19982.

Journal Entries.

November 5, 1913. It is ordered that the plaintiff be permitted to amend the petition at bar by inserting after the word "plaintiff," in the eighth line, on the second page thereof, the words "then employed by defendant," and after the word "directed," in the ninth line, on said page, the words, "by defendant;" and after the word "instructed," in the twelfth line, of said page, the words, "by defendant;" and after the word "destroyed," in the fifth line, on the third page, the words "and subsequently removed." Leave given defendant to file answer to petition as amended on or before November 10, 1913.

November 24, 1913. This day upon application of plaintiff and defendant it is ordered by the court that H. B. Diltz, official stenographer, is appointed to take the testimony in this case.

14 November 24, 1913. This day came the parties by their counsel and the following named persons who were duly impaneled and sworn as jurors in this case according to law, to wit: Ellis Jones, John Borst, Thomas Jerman, Robert Roes, Louis Strasser, Christopher Davis, Mont Smith, James Baker, Carl Sowming, John De Long, Williard Brink, Earl Little; trial progressed.

November 25, 1913. This day again came the parties by their counsel and the jury heretofore *being* duly impaneled and sworn, according to law; trial progressed, and after the jury had listened to the testimony, the arguments of counsel, and the charge of the court they retired to their room in charge of the court constable and afterwards came into open court with their verdict in writing to wit:

We the jury being duly impaneled and sworn find the issues in this case in favor of the plaintiff and assess the amount due to the plaintiff from the defendant at the sum of $25,000, twenty-five thousand dollars.

THOMAS JERMAN, *Foreman.*

December 29, 1913. This cause came on to be heard on the motion to set aside the verdict and for a new trial, and the court being of opinion that the damages assessed by the jury are excessive to the amount of nine thousand ($9,000) dollars, and the plaintiff here in court now consenting to remit the excess aforesaid, thereupon the said sum of nine thousand ($9,000) dollars being remitted and deducted from the said verdict, the court overruled the
15 motion for a new trial; to which ruling the defendant excepts.

It is therefore considered, ordered and adjudged by the court that the plaintiff recover from the defendant, the sum of sixteen thousand ($16,000) dollars, the residue of the damages by the jury assessed, together with his costs herein expended, taxed at $—; to which ruling, order and judgment, the defendant excepts.

[Duly certified.]

16 *Petition.*

[Filed May 6, 1913.]

HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Plaintiff,

vs.

THE JEFFERY MANUFACTURING COMPANY, Defendant.

The plaintiff is nineteen years of age, and brings this action by Joseph M. Downing, his next friend. The defendant is a corporation organized under the laws of Ohio, and doing business in Columbus, Ohio.

On the ninth day of June, 1912, and long prior thereto, the defendant was engaged in the manufacturing business in Columbus, Ohio, and was employing many hundreds of men regularly in the same business and in and about the same establishment, and had not paid into the state insurance fund any premiums provided by the Act of the General Assembly of Ohio, known as "The Workmen's Compensation Law," which was then in force, and which was passed May 31, 1911, being G. C. Sections 1465-37 to 1465-81, inclusive.

In the conduct of its business the said defendant used many buildings and many acres of land. On the south side of the grounds or lands used in the business of the defendant was a railroad track or switch used for the purpose of storing cars. To the
17 knowledge of the defendant said switch would hold eight ordinary freight cars, and no more, when said cars were crowded closely together. At the times hereinafter mentioned, and to the knowledge of the defendant, there were seven freight cars, standing upon said switch and between the fourth and fifth cars was an opening of about three feet, left for the use of employes of the defendant that might have occasion to pass between the ends of said cars, when engaged in the performance of their duties. Between said switch and the fence on the extreme south side of

said lands, and at the times hereinafter mentioned, were two piles of lumber. The plaintiff then employed by defendant herein had been directed by defendant to assist in removing said lumber to a point on the north side of said switch. In so doing, it was necessary, as the defendant well knew, and as the plaintiff had been directed and instructed by defendant to do, for the plaintiff to pass through said opening between said fourth and fifth cars on said switch. While plaintiff, following said instructions, was engaged in said labor, and as he was between said cars, the defendant caused to run against the car standing on the east end of said switch, a long cut of cars pushed by an engine, the property of the defendant, with the result that the cars on said switch were jammed and pushed together, and plaintiff was caught about the hips between said fourth and fifth cars.

The defendant negligently and carelessly had in charge of said cut of cars, the exact number of cars being to plaintiff un-
18 known, but a single man, whose duty it was to control the movement of said cars, give the necessary signals to the engineer running said locomotive, make the necessary couplings or uncouplings between said cars, watch the tracks on which said cars were moving, and give warning to those who might be in danger of injury, and do any and all other things incident to the control or movement of said cut of cars.

At said time the plaintiff had no knowledge that said cut of cars was about to be pushed into said switch or against said east car, and there was no signal or warning of any kind given to the plaintiff of the intention of the defendant so to do.

As the result of the injury then and there received, the joint of the plaintiff's right hip and leg was mashed, crushed, and permanently injured, to such an extent that the same was destroyed, and subsequently removed and the joint and bones of the left hip and leg were so mashed and injured as to render the plaintiff unable to use said leg.

The plaintiff because of said injury was made to suffer great pain of body and distress of mind, and said suffering since said date has been continuous and will be permanent. The plaintiff will throughout the rest of his life be and remain permanently a cripple, unable to walk, or to engage in his usual or ordinary avocation of a laboring man. Prior to said date, the plaintiff was a strong, able bodied, vigorous man, and was earning about two ($2) dollars per day
19 The said injury to plaintiff resulted solely from the negligence of the defendant in the following respects, to wit:

1. In causing said cut of cars to be pushed upon and against the cars standing upon said switch while plaintiff was between said cars.

2. In failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or against the car on the east end thereof.

3. In having an insufficient number of men or employes engaged in the handling and switching of said cut of cars.

Wherefore plaintiff prays damage against the defendant in the sum of thirty-five thousand ($35,000) dollars.

FRED M. McSWEENEY,
WILSON & RECTOR,
Attorneys for Plaintiff.

[Duly verified.]

Precipe.

To the Clerk:

Having reference to the style in the above entitled action, issue summons on the defendant, directed to the sheriff of Franklin county, Ohio.

Endorse: Action for money, amount claimed thirty-five thousand ($35,000) dollars.

FRED M. McSWEENEY,
WILSON & RECTOR,
Attorneys for Plaintiff.

20

Answer.

[Filed June 7, 1913.]

Now comes the defendant and for its answer to the petition herein admits that plaintiff is nineteen years of age and brings this action by Joseph M. Downing, his next friend; that the defendant is a corporation organized under the laws of Ohio and doing business in Columbus, Ohio; that on the ninth day of June, 1912, and long prior thereto the defendant was engaged in the manufacturing business at Columbus, Ohio, and was employing many men regularly in the same business in and about the same establishment and had not paid into the State Insurance Fund any premiums provided by the Act of the General Assembly of Ohio known as the Workmen's Compensation Law which was then in force, and which was passed May 31, 1911, Sections 1465-37 to 1465-81 inclusive of the General Code.

Defendant further admits that in the conduct of its business it used several buildings and several acres of land; that on the south side of the grounds or lands used in the business of the defendant was the railroad track or switch used for the purpose of storing railroad cars; that on the twenty-ninth day of July, 1912, there were seven freight cars standing upon said switch and between the fifth and sixth cars from the east was an opening of about three feet; that between said switch and the fence on the extreme south side of said lands were two piles of lumber; that while plaintiff was passing between said cars the defendant caused to run
21 against the cars standing on the east end of said switch a cut of cars pushed by an engine, and said cars which were standing on said switch were pushed together, and plaintiff was caught about the hips between said fifth and sixth cars.

Defendant further admits that said engine and cars were in charge

of a conductor whose duty it was to control the movement of said cars and give signals to the engineer running said locomotive, make the necessary couplings and uncouplings between said cars, watch the tracks on which said cars were moving, and do any and all other things incident to the control or movement of said cut of cars; and that no signals or warning was given to plaintiff.

Defendant further admits that as the result of said accident plaintiff's hips and legs were injured; that plaintiff suffered pain of body; that prior to said accident plaintiff was an able bodied man and was earning about $1.75 per day.

Further answering herein defendant denies each and every allegation and averment in said petition contained not herein admitted to be true.

First Defense.

Defendant for its first defense herein says that all of the circumstances and conditions surrounding plaintiff at the time of his said injury were all well known to him or by the exercise of reasonable and ordinary care would have been known to him and were incident to his employment, and the risks of injury therefrom or thereby were assumed by him.

22

Second Defense.

Defendant for its second defense herein denies that it was guilty of any negligence or carelessness and says that if it were negligent in any of the respects alleged in said petition the plaintiff himself was guilty of negligence which directly contributed to and was the direct and proximate cause of his said injury, in that he knew or by the exercise of reasonable and ordinary care ought to have known the danger of crossing the switch between said cars, and that with said knowledge or that knowledge which by the exercise of due care he would have had the said plaintiff negligently and carelessly crossed said track between said cars and was injured as the result of his own carelessness and failure to use due care in the premises.

ARNOLD & GAME,
Attorneys for Defendant.

[Duly verified.]

Reply.

[Filed November 24, 1913.]

The plaintiff denies each and every allegation of the answer of the defendant contained in the alleged first and second defenses ther-of.

WILSON & RECTOR AND
FRED M. McSWEENEY,
Attorneys for Plaintiff.

[Duly verified.]

23 *Motion for New Trial.*

[Filed November 28, 1913.]

Now comes the defendant and moves the court to vacate and set aside the verdict of the jury in favor of the plaintiff rendered herein on the twenty-fifth day of November, 1913, and to grant a new trial in this action, for the following reasons and causes affecting materially the substantial rights of the defendant, to wit:

First. Excessive damages appearing to have been given under the influence of passion or prejudice, and aggravated by the circumstances attending the appearance of the plaintiff at the trial far beyond what would be reasonable compensation to the plaintiff for his loss of time, loss of earning power and reasonable and proper allowance for pain and suffering.

Second. Errors of the court in the admission of evidence offered by the plaintiff, to which the defendant at the time excepted.

Third. Errors of the court in the exclusion of evidence offered by the defendant, to which the defendant at the time excepted.

Fourth. Errors of the court in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the defendant before the arguments in said cause, to which the defendant at the time excepted.

Fifth. Errors of the court in the charge to the jury at the close of the arguments of said cause, to which the defendant at the time excepted.

24 Sixth. Error of the court in refusing to send to the jury room for consideration by the jury during its deliberations the affidavit of W. A. Grieves filed herein setting forth the testimony of James Christ, and which was during said trial read as the evidence of said Christ, to which the defendant at the time excepted.

Seventh. Error of the court in charging the jury that under the provisions of the Ohio Workmen's Compensation Law, being the act of the General Assembly of the State of Ohio approved June 15, 1911 (102 O. L., 524), to the effect that the defendant could not avail itself of the first and second defenses set forth in its answer herein, and that the same could not operate as a defense herein, for the reasons that said act is invalid and void, and the provisions thereof removing the defenses of the assumption of risk, fellow servant rule and contributory negligence are void, as violating the provisions of the Constitution of the State of Ohio and the several and respective amendments thereof and thereto, and the provisions of the Constitution of the United States and of the several and respective amendments thereof and thereto.

Eighth. Errors of law occuring at the trial of said cause to which the defendant at the time excepted.

Ninth. That the verdict is not sustained by sufficient evidence and is contrary to law.

W. WILSON CARLILE AND
ARNOLD & GAME,
Attorneys for Defendant.

25–30 *Bill of Exceptions.*

[Filed January 16, 1914.]

Present:

Messrs. Wilson & Rector, Fred M. McSweeney and Henry A. Middleton, on behalf of the plaintiff.

Messrs. Arnold & Game, and Butler & Carlisle, on behalf of the defendant.

And be it remembered, that on the trial of the above entitled cause, at the September Term, A. D., 1913, at Court of Common Pleas of Franklin county, Ohio, before Hon. Marcus G. Evans, Judge, and a jury duly impaneled and sworn, the plaintiff, to maintain the issues on his part to be maintained, offered and introduced in testimony on his behalf the following evidence, to wit:

Monday Afternoon Session, November 24, 1913.

31 HARRY O. BLAGG, called on his own behalf, being first duly sworn, testified as follows:

Examined by Mr. RECTOR:

Q. You see these men here? (Indicating.)
A. Yes.
Q. You talk to those men. What is your name?
A. Harry Oakley Blagg.
Q. Now, don't exert yourself; just talk as if there was nobody here. Where do you reside—in Columbus?
A. Why, yes.
Q. How old are you?
A. 20.
Q. This lady here was your sister?
A. Yes.
Q. Your father and mother, I believe, are dead?
A. Yes.
Q. Were you raised in Columbus?
A. Partly, yes sir.

32 Q. What have you done, during your life, in the way of laboring?

A. I have worked several places, worked at a shoe factory, and I just done common labor.

Q. The last place you worked was at the Jeffrey Manufacturing Company?

A. Yes.

Q. I think I omitted to ask you whether or not, you are the plaintiff in this case; you are?

A. Yes.

Q. When did you begin your laboring for the Jeffrey Manufacturing Company?

A. In July.
Q. Of 1912?
A. Yes.
Q. How long have you worked there before you was hurt?
A. I had worked there about—I was going on the third week.
Q. Had you ever worked there before that time?
A. Yes.
Q. How long before?
A. A year before, I believe.
Q. When you were working at the plant of the defendant, at the last time you were employed, what were you doing; what was your work?
A. Just labor.
Q. And where did you labor?
A. In the yard of the Jeffrey, clean up—helped clean up the yards.
Q. That is carry the rubbish off and pile it and so forth?
A. Yes, sir.
Q. And were you doing that the day you were hurt, Harry?
A. Yes.
Q. Who was your foreman that day?
A. Mr. Coleman.
Q. Mr. Coleman?
A. Yes.
33 Q. Had he been your foreman all the time?
A. Yes, sir, the last time I worked there.
Q. The last time you worked there?
A. (No response.)
Q. And how many were there in your gang?
A. Three at the time, three.
Q. And give their names?
A. Why James Christ, I believe is one, they call him Jimmie; he was a Macedonian; and Louie—they called the other Louie, Louie—I don't know his last name.
Q. Yes, his name was Louie?
A. His name was Louie, they called him Louie.
Q. Was he a Roumanian?
A. Yes, sir.
Q. There were just the three of you then?
A. Yes, sir, and myself.
Q. Now coming down to the day when you were injured, what time did you begin work that morning?
A. (No response.)
Q. Oh, as nearly as you can tell—6:30—are you comfortable there?
A. Yes, sir; 6:30.
Q. And what time in the day were you injured?
A. Well, I don't know the exact time but I think it was between two and three.
Q. Yes, in the afternoon?
A. Yes.
Q. What were you doing, when you were hurt?

A. Why, I was—I was packing some rubbish that was piled up, to be moved; the foreman asked me to move it and we moved it and I was packing plank—a piece of rubbish.

Q. From where?

A. From the south side of the track at the Jeffrey, the south side of the track.

34 Q. Over to where?

A. We was packing it to the north side of the track and taking it around by the south-west corner of the wood shed, what they call the wood shed, to pile it up there.

Q. That is where they keep those old patterns in there, that big long wood shed?

A. Just the big shed where they keep the lumber, the wood.

Q. Now you said the foreman told you to do this; who was your foreman?

A. Mr. Coleman.

Q. I wish you would tell the jury just what he said to you on that occasion?

A. Why, Mr. Coleman, was always a man——

Q. Now just listen; now just tell the jury in the shortest way you can, what he said to you and what he told you then to do?

A. Well, he said for us to—when we got done cleaning up there to turn and clean the other side, that there was some rubbish to be carried over to that pile on the other side, and he told us to clean up over there.

Q. Yes, and what did he mean by the other side?

A. The other side of the track.

Q. Yes?

A. Over there—(Indicating.)

Q. Yes, and what time in the day was it he told you that?

A. He told us that—well I don't know just exactly.

Q. How soon after your lunch, after your dinner?

A. Oh, it was well, 1:30—about two hours after lunch; I should judge it was two hours.

Q. What did he do then; where did he go after he told you that?

A. Why, I don't know where he went; he went away.

35 Q. Yes, and after he went away, what work did you men do?

A. Why Jimmie Christ, he was taking brass hinges off of the desk doors, the old desk doors, that would be taken off and he was taking them off and we had our piles cleaned up and so I don't know where Louie went, Louie went some place and I went on over to clean up the other side.

Q. Now, how many cars, if more than one were there on that track, on that storage track at the time?

A. Well, there was nine or ten anyhow.

Q. Well, you don't know how many it will hold do you?

A. No, sir, not exactly.

Q. Yes; and how did you get to the side—to the south side of the cars?

A. Why I was coming up to go over to clean up the other side——

Q. Well, now, listen to the question, how did you get across the track?

A. I went through a cut of cars.

Q. And how wide was the opening, how many feet between the cars?

A. Oh, I should say from four to five feet, I should judge.

Q. And how many cars were west of the opening as nearly as you can remember?

A. Four or five I should say.

Q. And how many cars were on the storage track, east of the opening?

A. I think four or five or six—five or six.

Q. And what were they—box cars or coal cars or gondolas or what?

A. Why coal cars—or box cars.

Q. They were box cars?

A. The most of them.

36 Q. The most were box cars?

A. The most of them I noticed were box cars.

Q. Now, how wide is the strip of ground between the south side of the cars and the south fence, how many feet?

A. Between the cars and the fence.

Q. Between the cars and the fence?

A. How many feet?

Q. Yes?

A. I believe there is—four or five feet—five or six.

Q. Is that a high board fence?

A. Yes.

Q. Now in there, as I understand you, in that strip was where your rubbish was?

A. Yes.

Q. That you were cleaning up?

A. Piled up inside the fence.

Q. Just let your head rest back on your pillow there. And where were you bringing that; where were you intending to carry that rubbish?

A. To a pile that we had just got through on.

Q. Yes?

A. To over by the wood shed.

Q. And had Jimmie Christ made any trips after lumber over there?

A. Not as I know of.

Q. Not as you know of?

A. Yes, sir.

Q. But he had gone away after you finished that job some place?

A. Yes—not Jimmie Christ—Louie.

Q. Louie was it?

A. Yes.

Q. Oh, Louie—Oh, Jimmie was taking the hinges off?

A. Just off the door.

Q. Well, how many loads of boards had you carried from behind those cars before you were injured?

A. Well, I made three or four trips through there.

37 Q. And how many——

A. I didn't carry boards altogether.

Q. What was it you carried?

A. I carried some pieces of railroad ties and just rubbish we picked up along the tracks.

Q. Well, yes, and how did you carry it, on your back or shoulder?

A. My shoulder.

Q. Well, where with reference to the opening in the cars was the rubbish that you were carrying; I mean was it east of it or west of it or opposite to it?

A. It was—from the cars you mean?

Q. You know where the opening——

A. The opening.

Q. Where you went through; now where was that rubbish?

A. Well, it was scattered right along in piles.

Q. I see, it wasn't in a pile?

A. It wasn't all in one pile; there was some piles——

Q. There were several little piles of it. You know what I mean by the storage track, don't you, where they stood cars there that were switched?

A. Yes, sir.

Q. In the time that you had worked there, had you seen the cars cut for men to go through?

A. Why I had never worked around there very much and I never seen any cars there; this was the most cars that was standing there since I had been working there.

Q. Had you seen men working in that vicinity?

A. Yes.

Q. Well, had you seen the men going in through between the cars?

A. Yes.

38 Q. That is what I mean. I mean had you seen openings between the cars on that storage track?

A. Yes, sir.

Q. In your work about there?

A. (No response.)

Q. Well, now, where, if at all, does that track bend east of the storage track, how near the end of the storage track does the railroad track begin to bend around to the north there?

A. No response.

Q. You know where the switch is, where the switch ends?

A. Yes, sir.

Q. Well, how far east of that switch does the track begin to bend, as you remember it?

A. Well, I don't know.

Q. Can you approximate it?

A. There is a bend in there but I don't know just how——

Q. Dosn't it begin right at the switch?

A. No. I don't believe it does.

Q. A little east of it?

A. Yes.

Q. Well, when you were between the cars and the fence, did you see a locomotive and a cut of cars approaching from the east?
A. No, sir.
Q. Why not?
A. Why, because I could not see any——
Q. Well, why couldn't you see; what obstructed your view?
A. Why it went around that curve, why the engine must have been to——
Q. Well, I want now the cause. I just want to ask you, you say it was on account of the curve. Well, now before you made your trips there across the track, with the loads, did you ascertain—did you try to see or hear?
39 A. Yes, sir, I looked up and I looked down east and west.
Q. And did you see or hear any approaching cut?
A. No, sir.
Q. Was there any warning—well, I guess that is admitted—no warning given him. Now you may tell the jury when you first knew that those cars were moving upon you; where were you when the cars moved?
A. Well, sir, I just stepped into the cut with a load, and I was coming and I heard the cars coming together on me; of course I started for the north side of the track, and the cars got me—I just got out of the road of the drawbars and got out—the dead heads caught me.
Q. The dead heads caught you?
A. The dead heads caught me.
Q. Where, about the hip?
A. About the hips.
Q. Did you fall forward there?
A. Yes, sir, I fell down right there.
Q. And then you were taken to the hospital
A. Yes.
Q. Have you been out of the hospital before today?
A. I have not until——
Q. Had you left the hospital before, to come here?
A. Only to go to the park.
Q. Only to go to the park?
A. Go in a wheeled chair.
Q. And when did you make your first trip to the park?
A. I believe it was in August.
40 Q. How far from the cut through which you went, is the big machine shop?
A. Well, it was within twenty feet, anyhow.
Q. Yes?
A. Within twenty feet.
Q. Now did I ask you whether or not you had a load in your arms when you were caught between the cars, did you have wood in your arms?
A. Yes, *sri*, I had a load.
Q. You were starting across to put it on that pile?

A. To carry it away and get it out of the road, clean up as they call it.

Q. Well, now Harry, after you were taken to the hospital, tell the jury whether or not you suffered pain from your injuries?

A. Well, I didn't know what I suffered the first two weeks; I went there but after that I suffered greatly.

Q. And how long have you been suffering?

A. Why—I have been suffering more or less up to the present time.

Q. And are you in pain now?

A. No, sir.

Q. Not now. Your leg was removed about four weeks ago?

A. Six.

Q. Six; what was the condition of that leg; did it stick out before——

A. Yes, sir, there is always a dead weight on me; it wasn't no—I could not move it; did not have no use for it.

Q. Well, have you any feeling in your right leg?

A. This one (indicating).

Q. I mean your left leg?

A. Yes, sir.

Q. Can you feel that; can you feel it if you are pinched in your left leg?

A. Yes.

41 Q. How much can you move your foot—don't try, just——

A. Well, move it a little; not good.

Q. Well, can you raise your leg at the hip joint?

A. Yes, sir, raise this one (indicating left); can't this one (indicating right).

Q. You never could move your right leg at the hip joint could you?

A. No, sir.

Q. Have you at this time a running sore on your back?

A. Yes.

Q. And how frequently has that been dressed since you have been in the hospital?

A. Daily, once a day.

Q. And does it hurt you to have that dressed?

A. Yes.

Q. How do they go about it?

A. Why they irrigate me outside.

Q. Have you got drainage tubes in there now?

A. No, sir.

Q. How long has it been since you have had them in?

A. Why I don't remember ever having drainage tubes in my hips; they irrigate me by sticking a hose in my hip and drain it through the back and it come- out my back.

Q. How long have they been doing that?

A. Well, sir, ever since I can remember.

Q. Ever since you have been there?

A. In the hospital; sometimes they would not irrigate me every day; they would not irrigate.

Q. What did you make a day when you were working?

A. $1.75, ten hours.

42 Q. Had you been to work; did you go to work when you were young?

A. Yes.

Q. How much of an education have you got; did you go through High School?

A. No, sir.

Q. Just went through the grades?

A. Yes, sir.

Q. You can read and write and all that?

A. Yes.

Q. Well you were never married of course?

A. No, sir.

Q. What was the condition of your health before you were injured?

A. Well, I—right before I got hurt I passed the examination for United States Navy at Cincinnati.

Q. Well, I am not asking you particularly about that, but were you strong or weak?

A. Strong.

Q. Ever been sick any?

A. No, sir, not to amount to anything; I never was taken sick in bed.

Q. You never were sick in bed?

A. (No response.)

Q. About what was your height?

A. About five foot, seven.

Q. And what did you weigh before you were injured?

A. Between 158 and 164 pounds.

Mr. RECTOR: Mr. McSweeney, do you think of anything else?

Mr. MCSWEENEY: No.

Cross-examination.

By Mr. ARNOLD:

Mr. RECTOR: Harry, will you take my chair?

Mr. ARNOLD: No, I will speak so that you can hear me but you need not turn your head.

43 Mr. RECTOR: You can take my chair if you want to.

Mr. ARNOLD: No.

Q. Where were you working on the day that you were injured?

A. We was working in the wood shed there, cleaning the stuff out of the wood shed, in the morning we were straightening the wood shed up.

Q. Had that been finished by noon time?

A. We—well, sir, I don't know whether finished or not by noon time—no, sir, I don't think it was finished by noon time.

Q. It was finished before you went across the track?

A. Yes.

Q. How long before you started across the track had Mr. Coleman, the foreman, been there?

A. How long before—I expect five or ten minutes.

Q. When was it that he told you about cleaning up around there, as you have stated; was it before or after the noon hour?

A. It was after the noon hour.

Q. I wish you would tell us just what Mr. Coleman said to you?

A. Why, Mr. Coleman, he told us to—when we got this done that he wanted the other side cleaned up—the other side of this track.

Q. Now how long was it after the noon hour, or about what time in the afternoon was it, that he told you this?

A. Well, it was before we got done with the other pile on the other—the north side of the track, it was before then and I expect it was—I should judge two o'clock or somewheres around one thirty.

44 Q. Was Mr. Coleman there at the time that you had finished this work of cleaning up and straightening up in the shed?

A. In the shed, yes, sir.

Q. So that before he left there on this occasion after lunch you had finished straightening up the shed?

A. That was done, finishing up the shed, when he——

Q. When he left?

A. When he left, we had a pile to remove in the end of the wood shed over on the west side of the wood shed.

Q. Well, you and him—that is James Christ—and Louie had been working there cleaning up the shed had you?

A. Yes.

Q. And when Mr. Coleman gave you this direction you were all three there?

A. Yes.

Q. You all three heard the directions which he gave?

Mr. RECTOR: Wait a minute.

WITNESS: Well, I——

Q. If you know?

Mr. RECTOR: Wait a moment, he can testify if they were within hearing distance but whether they all heard, he cannot tell.

The COURT: State whether he heard—what was the question?

Mr. RECTOR: He asked whether he heard him.

Mr. ARNOLD: I asked him if he heard.

WITNESS: I heard him.

Q. Where were the other two?

A. Why Jim Christ was working on the pile, working right
45 with me from one pile to the other, carrying the loads, carrying the wood from one pile to the other, him and Louie.

Q. That is you mean that they were both helping—after Coleman gave this direction, they were both helping you or doing the same work you were doing, carrying the stuff from across the track over to the west side of the lumber shed?

A. Not from across the track—from the south—or from the south end of the wood shed, we had piled—we had made a pile there and Mr. Coleman made us remove it; removed from the one—remove it from the south end of the wood shed to the west end where it could be hauled away, get it with a wagon, or burnt, or whatever they do with it.

Q. Well, had that work been done by the time that Mr. Coleman left, after lunch, as you have said—I mean by that the piling around the shed?

A. Why, Mr. Coleman left before we got done.

Q. Before you got the piling done?

A. Before we got the pile removed.

Q. Well, now you said that they were carrying lumber—was that from the inside of the shed around to the outside of the shed on the west side?

A. We had finished cleaning up and we had cleaned up the inside and piled all the old lumber on the south side of the shed, by the door—Mr. Coleman come around and told us to remove that, that he wanted it over to the west side—on the south-west side of the wood shed and so we removed that pile around there.

46 Q. And that was the work you were doing at the time Mr. Coleman left?

A. That is the work we was doing, moving that pile.

Q. How long did you work at that after he left?

A. Well, I don't know just exactly how long.

Q. Well, just state about how long?

A. I expect we worked fifteen or twenty minutes at it.

Q. Had that been finished?

A. The pile was removed.

Mr. RECTOR: Well, wait a minute, finished when?

Mr. ARNOLD: Any time while he was working of course.

(Previous testimony read.)

Mr. RECTOR: Oh, I didn't understand your question.

Q. All this direction which you say Mr. Coleman gave you to go to the other side of the track—Louie and you were both about there were they not?

A. Yes.

Q. They had both been working at the same work, removing this lumber to the west side?

A. From the south side——

Q. Yes, to the west side?

A. To the west side.

Q. And were they doing that when you started a-ross the tracks?

A. Well, Jimmie Christ was doing—was taking hinges and all the little brass off of the old desk doors that they had in the wood shed and he was taking them hinges and brass off of there, the locks, you know and so he done that, and Louie, he was helping him, *he was helping him* and I started over to the other track—to the other side of the track.

47 Q. Didn't you notice that to the west of all these cars, there was about fifty feet of open space on that storage track?

A. No, sir.

Q. Aren't you mistaken in saying that there were four or five cars west of the opening on the storage track?

A. No, sir.

Q. Weren't there only two cars west of that opening?

A. There was more than two cars; the exact number I could not say but there was more than two cars.

Q. Aren't you mistaken in the statement that there was a distance of four, five, or six feet between the box car and the storage track and the fence?

A. No, sir.

Q. You think it is as much as five or six feet?

A. Yes.

Q. Did anybody point out to you this rubbish on the other side of the storage track?

A. Why, Doctor—or the foreman told us that it was over there, yes, sir, we could see it.

Q. Told all of you that that was over there?

A. Told us that it had to be cleaned up, that there was some rubbish over there and it had to be cleaned up.

Q. Well, now you say that there were in all eight or ten box cars standing on the storage track; you could not have seen that rubbish unless you went clear around on the other side of the cars, could you so as to have looked down along between the cars and the bend?

A. Yes, sir, I could see it through the cut; I could see one car through the cut of cars.

48 Q. You think that cut was as much as three or four feet?

A. Yes.

Q. Was it as much as four or five feet?

A. Between three and five.

Q. Do you know Miss Skidwell?

A. Yes.

Q. She is the nurse up at the Emergency Hospital of the Jeffrey is she not?

A. Yes, sir.

Q. She has frequently been over to see you?

A. She has.

The COURT: I don't know whether you can hear; can you hear?

The JURORS: Yes.

The COURT: It is a little hard to hear him here.

Q. Do you remember in a conversation with her, at the Protestant Hospital, a few weeks after the filing of this case, that you said to her in substance as follows: "The lawyers said, 'now didn't your foreman tell you to go between the cars?' And I told him he did not because I didn't want to lie about it?"

A. No, sir, I don't remember of saying anything like that.

Redirect examination.

By Mr. RECTOR:

Q. Harry, I will ask you whether or not you had seen those cars moved that way on the storage track, or switch, during the time you had been working in the shed?

A. No, sir.

Q. Had they been moved?

A. I hadn't seen them.

Q. Was there any other way for you to get between the cars and the fence, except to go through that cut?

A. Why, there was by going around by the west end and
49 run the chances, there is a narrow place down there and going around the cars.

Q. You mean below the bumpers?

A. Below—on the west side—and of the cars.

Q. Oh, yes?

A. Or I could have went by going between the machine shop and the cars, and going north, and going in between there, but it is ninety feet—ninety foot out of the way anyhow.

Mr. RECTOR: Do you think of anything else, Mr. McSweeney? Now, Gentlemen, this man would like to—Harry—if you are through with him, I think he had better go back.

Mr. ARNOLD: I certainly think so.

Mr. RECTOR: We do not want to recall him unless it becomes necessary.

And also JAY R. MINNEAR, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. RECTOR:

Q. Mr. Minnear, what is your full name?

A. Jay R. Minnear.

Q. You spell that J-a-y?

A. Yes.

Q. And where do you reside?

A. 887½ North Fourth street—886½ rather.

Q. What is your occupation?

A. Why, I run that crew at Jeffrey's.

Q. How is that?

A. Switchman.

Q. You are switchman at the Jeffrey plant now?

A. Yes.

50 Q. You say you run a crew?

A. Oh, yes, I run the switching crew.

Q. How many men in your crew?

A. Why there is three of us.

Q. Now what were you doing in July, of 1912?

A. I was——

Q. The same thing?

A. 1912—yes.

Q. The same thing?
A. Yes.
Q. And how long had you been in that position, Jay?
A. Well, I had been started at the job—it will be two years in January, this coming January.
Q. Now the track that is on the south side of the yards, and near the fence along there, on the south side is known as what?
A. Why we call it the fence track—that is the name of the track but it is the storage track.
Q. It is a storage track?
A. Yes.
Q. On which you put cars that you want to hold a while?
A. Well, yes, that we use to switch in and out or put cars to store them you know that we——
Q. Yes; how many cars when they were crowded closely together, will that track hold?
A. Well, eight.
Q. Eight; do you remember how many you had on it the day Blagg was hurt?
A. We had seven on it at the time.
Q. Seven?
A. Yes.
Q. And between what cars was he—while I am on that subject—was he caught?
A. Well, I cannot just exactly state that.
51 Q. Well, as nearly as you can tell?
A. Well, I think it was between the third and fourth car from the west end.
Q. From the west end; do you know how much of an opening there has been between those cars, there had been left?
A. No, sir.
Q. Now, where is the east end of the storage track with reference to the first switch?
A. I don't get——
Q. You know there is a switch turns off there?
A. (No response.)
Q. The west end of the track is down at the sand shed?
A. Well, the sand shed is east from the first switch you know, there was no sand shed——
Q. Well, there is a little shed away down at the end, we called it the sand shed this morning.
A. Well, it is a shed of course——
Q. Well, we will call it the shed then; I might be wrong in the name but there is a shed right at the west end?
A. Yes.
Q. Of the storage track is there?
A. Yes.
Q. Then how far east does the storage track extend?
A. Well, eight car lengths.
Q. Well, is that about to the switch up there?

A. Well, what I mean by eight car lengths, I mean it clears the switch—eight cars just clears the switch.

Q. Just clears the switch so that that comprises the storage track?

A. Yes.

Q. Of course, Jay, I want these men to hear you and you will have to speak a little louder.

The COURT: Do you all hear, gentlemen?

52 A JURYMAN: We can all hear but a little louder wouldn't hurt.

Q. Just speak as loud as you can, Jay, if you please. Just east of the switch, state whether or not, there is a bend in the track towards the north?

A. Well, quite a little ways east there is.

Q. Well, how far east, how many feet?

A. Well, now I would not say.

Q. Sir?

A. I would not say; several car lengths, before there is any fence.

Q. Well, how many car lengths?

A. I could not say exactly.

Q. Well, would you say three?

A. Well, more than that.

Q. Four?

A. Let's see, from the switch do you mean?

Q. Yes, from the east end of the storage track how far is it until the track bends to the north—you know it does bend to the north?

A. Yes.

Q. Now how far is it to the point where it does bend to the north?

A. I would imagine about four or five car lengths.

Q. Yes. You heard that Blagg was hurt—and by the way do you remember the day of the month?

A. No, sir, I don't.

Q. Well, anyhow on the day that Blagg was hurt, how many cars did you have in the yard there?

A. Well, I don't know exactly how many.

Mr. ARNOLD: Do you mean on the storage track?

Mr. RECTOR: No, in the yards all around.

53 Mr. ARNOLD: I object to that.

Mr. RECTOR: I want to show the general situation there.

Mr. ARNOLD: That hasn't anything to do with the storage track.

Mr. RECTOR: It is proper to show the magnitude of this man's work.

The COURT: I cannot tell at this stage whether it will be material or not. If it is a part of the res gestæ or part of the description of the locality there, of course it would be competent.

Mr. RECTOR: We claim it is so.

The COURT: You expect to show that.

Mr. RECTOR: Well, certainly.

The COURT: Well, answer that.

Mr. ARNOLD: Note an exception.

Q. Would you say you had forty or fifty?
A. Well, I could not exactly say now just how many there was.
Q. Of course, Jay, I do not want you to be accurate to the very dot; what I want is your best impression and best recollections?
A. Well, best recollection was in the neighborhood of forty cars.
Q. Yes; that is all I want, your best recollection?
A. Yes.
Q. About three o'clock in the afternoon it was that Blagg was hurt, was it not?
A. Well, I don't know the exact time; it was along in the middle of the afternoon, some place along.
54 Q. Would you say it was later than three?
A. No, I don't think it was; I think it was between two and three, I think that it was.
Q. You are not sure about that?
A. No, I am not sure about the time.
Q. Who was your engineer?
A. Graff, Charlie Graff.
Q. Charles Graff, and how many men comprised your crew?
A. There was two of us at the time.
Q. Now just tell the jury what that work consisted of as a switchman, what did you have to do or what did you do?
A. Well, I switched the cars.
Q. Who gave the signals to the engineer?
A. I did.
Q. And who watched out, if there was any watching done?
A. Why, I done the watching.
Q. Who made the couplings?
A. I made the couplings.
Q. Who made the uncouplings?
A. I made them.
Q. You were the only man in that crew outside of the engineer?
A. Yes.
Q. And the company owned this locomotive?
A. I suppose so.
Q. Well, they did, didn't they?
A. Sir?
Q. That is a fact, it was the company's locomotive wasn't it?
A. I suppose so, it is operated—they operate it; I suppose it is—their name is on it.
Q. Their name is on it?
A. (No response.)
Q. Now how many cars were moving in the cut that bumped into the storage track when Blagg was hurt?
A. Well, my clearest recollection, I believe there was six cars that I had hold of.
55 Q. Where were those cars when you started with them?
A. Well, I think I had come from the north side, with probably three or four and I think the Big Four had shoved in the rest, inside of the gate on the south yard.
Q. Then the engine was at which end, the north end?

A. The north end of the cut, yes.
Q. The north end of the cut?
A. (No response.)
A. And you brought them around at the end of the track?
A. Yes, sir, I had to bring them up.
Q. How far does that track run up north?
A. Well, the track, the long single track runs to First avenue, that is just north of First avenue.
Q. That is about a block north of the south fence of the yards, about a city block?
A. Well, it is a good big city block.
Q. Well, were you on the cut as it came down around the curve; were you riding on it?
A. You mean when we shoved up to make——
Q. Yes?
A. Yes, sir, I was on the front end of it.
Q. You were on the front end?
A. Yes.
Q. On which side of the cars were you riding, north side or south side as they came around the bend?
A. On the north side.
Q. I will ask you whether or not you were in a position where you could see down between the cars, standing on the storage track and the fence?
A. How do you mean?
Q. As you came along the fence and down the track there, riding the cut cars, could you see between that fence and the cars
56 that were standing on the storage track?
A. No, sir.
Q. You could not see and why could not you see?
A. Why the fence is close.
Q. And the cars were high; there were box cars standing there, weren't there?
A. There was mixed cars.
Q. And you didn't see between the fence and those cars as you came around did you?
A. No, sir.
Q. And there was nobody else on the cut to see?

Mr. ARNOLD: If Your Honor, please, we don't see that——
Mr. RECTOR: Do you think that is leading?
Mr. ARNOLD: We want to be a little bit reasonable.
Mr. RECTOR: A little bit leading?
Mr. ARNOLD: Well, I said a little more.
Mr. RECTOR: Well, just a little leading—I will sustain that objection.
Mr. ARNOLD: Trying to observe the proprieties.

Q. Was there a whistle on the locomotive or not?
A. Yes.
Q. How fast was the cut of cars moving as you came around the storage track?

A. Well, I would not say; it wasn't going very fast though.
Q. Well, how would you say as compared with a man trotting along?
A. Well, a man could easily trot along the side of it.
Q. What were you intending to do with that cut of cars?
A. Why I intended to shove up one more car in the storage
57 track.
Q. Now do you know Coleman?
A. Lon. Coleman?
Q. Yes, he was the foreman of the gang that cleaned up there?
A. Yes.
Q. Do you know him?
A. Yes.
Q. State whether or not, he had prior to this time given your directions with regard to openin *on* the cars on the storage track so that men might go between?
A. I don't understand you, whether you mean that instant or before.
Q. No, before that?
A. Well, I had I think a time or two, had either cleared the track where there was just a few cars or else where there was probably five or six stopped them a good long ways when he notified me that he was going to clean up.
Q. Did he give you such notice on this day?
A. No, sir.
Q. What is the fact as to men passing between the cars on the storage track and working in that vicinity of the cars?
A. How do you mean?
Q. Well, I mean do they work there; did you often see them work there?
A. Why there is no work there.
Q. Sir?
A. No, sir.
Q. Haven't you seen them there?
A. Well, there is no work there.
Q. I didn't ask you whether there was any work there or not.
A. (No response.)
Q. How many times before that did you say, during the time that you worked there, Jay, had you opened these cars or cleared
58 the track, on Coleman's notice?
A. Well, I would say once or twice; I don't just exactly recollect.
Q. Didn't you say a while ago two or three times?
A. Well, I say I think—now I am not stating positively——
Q. Well, of course I understand?
A. I have a recollection of doing that once or twice.
Q. Well, did they call you the conductor or switchman?
A. Well, call me either; I suppose I was conductor of course.
Q. When did you first see Blagg after your cut of cars went round there?
A. Well, after I had made the coupling and we started to shove

on in and got the one car in the clear, why I heard him holler and seen him fall at about the same time, down across the track.

Q. Well, I omitted to ask you was there a bell on this engine?

A. Yes.

Q. Did you notice Jay, whether or not, he had any lumber in his arms?

A. Well, now of course, I couldn't see him; he was down; he had no lumber in his arms when I got to him but there was lumber laying there, pinned in under the wheels.

Q. And about how far, Jay, did you find him from the big machine shop?

A. Well, wasn't very far from the west end of it.

Q. Now you have been working there and handling cars for six months prior to this inquiry to Mr. Blagg, approximately?

A. Something like that, yes, sir.

59 Q. January up to June or July, when he was hurt?

A. Yes.

Q. Had you done anything else but switch cars?

A. That is all.

Q. In your opinion, how many men were required or should have been in the crew that was handling cars and switching cars in the yards there?

Mr. ARNOLD: Don't answer that. We object.

Mr. RECTOR: Let your record show that I do not insist on that last question.

The COURT: Proceed.

Mr. RECTOR: That last question, I withdraw.

The COURT: The last question is withdrawn is it?

Mr. RECTOR: Yes, sir.

Q. Will you give the dimensions *for* the wood that you saw between the cars when he fell down?

A. I could not give any accurate dimensions or anything.

Q. As near as you can?

A. Well, it runs in my mind there was probably a couple of pieces, probably three pieces laying on the track and they would look like pretty heavy pieces; that is, one of them looked like a two by four, or two by five, or something like that.

Q. How much of the time prior to the date that you are speaking of, the date of the injury, was consumed in switching cars through the yards?

A. I don't understand you.

Q. Were you busy all the time switching cars to the yards?

A. No, sir, not all the time.

Q. You did nothing else?

A. That is all.

60 Q. On which side of the engine was the engineer sitting as the cut came down, which direction?

A. Why he was on the right side of the engine; that would make it on the north side.

Q. The engine was towards the west, or towards the south and then the west?

A. South and west.

Q. The engineer was sitting on the north side?

A. Yes, sir.

Cross-examination.

By Mr. ARNOLD:

Q. You have been engaged in railroading for a number of years, haven't you?

A. Yes.

Q. How long before you went with the Jeffery Company?

A. Well, I had railroaded a short time with the Big Four, something like six or seven months before I started with the Jeffrey.

Q. Then with other railroads prior to that?

A. Yes.

Q. Pennsylvania and Hocking Valley?

A. Yes.

Q. You had been doing braking and switching, firing?

A. Yes.

Q. This storage track was a track upon which were set dead cars, as they were called, was it not?

A. Well, that would depend, the way a man would call them of course; of course holds more cars than any single track we had in the yards and it was used mostly for the storage cars; that is, cars I did not need to spot immediately for unloading was put up there.

Q. It wasn't used for loading and unloading cars?

A. No, sir.

61 Q. There were no men, employes there, that would have any occasion to go about those cars, that were on that track for the purpose of loading or unloading the contents?

A. No, sir.

Q. The distance from a box car standing on the storage track and the fence to the south is not to exceed three feet, is it?

A. Well, I would not think so, no.

Q. You were asked the question as to whether cars were open or the storage track cleared when men might happen to be working over along the fence to the south of the storage track; is it not a fact that whenever there was any of that kind of work done, you were notified and the track was cleared of cars—the storage track was cleared of cars?

A. You mean when—for cleaning up?

Q. Yes?

A. Well, as I said a while ago that once or twice an occasion that they had cleaned up or something like that, at least I know once or twice anyway, I had either pulled the cars out and cleared, or else left a big space, been notified that they would be working there.

Q. Did you ever see any men working south of that track except on these occasions, when you would be notified?

A. No, sir, I never saw nobody.

Q. How much of a space would you leave between the cars?

A. Well, that would be all according to how many cars there was there.

Q. Well, you would leave thirty or forty feet between the cars?

A. I always aimed to leave all of that when anybody was
62 going to work between them, at all.

Q. That much or more?

A. That much or more, yes, sir.

Q. Now, as a matter of fact, men did not pass and had no occasion to pass from the north side of the railroad track to that narrow space between the track and the fence on the south of the railroad track, except when they might be cleaning up?

Mr. RECTOR: Wait a minute. That calls for his conclusion.

The COURT: Read that, please.

Mr. ARNOLD: I am asking for facts.

(Previous question read.)

The COURT: If he knows they had occasion to go there for any other purpose, as a matter of fact, he may state.

Mr. ARNOLD: I am asking for the fact, if the court please?

The COURT: You may answer.

WITNESS: No, not—I don't know of anything else; I never saw nobody down there like this going through that had any—using the track, that is, crossing clear across the track.

Q. Never saw any men crossing that track at all except on the occasions when they were clearing up that narrow space along the fence?

A. I have no recollections of it.

Q. Do you remember how much space there was on the west end of the storage track, west of the west car, on that track, after
63 the accident—at the time of the accident and which you saw after?

A. No, sir, I could not state.

Q. Well, could you approximate it?

A. Well, I won't say; however, of course the track holds eight cars and there was seven in there and possibly the car that I was shoving in there, the eighth car was probably ten or fifteen feet in on the fence track; it would not—a man could figure the rest; that it holds eight cars and probably was seven cars and a half or something like that in, when this accident occurred.

Q. So that the fifteen or thirty feet, you would think on the west end of the storage track, cleared?

A. Well, I could not say exactly to that.

Q. Now, at the time you came in there—just before the accident——

Mr. ARNOLD: Will you mark this diagram?

Mr. RECTOR: You mark it.

And thereupon the diagram so last above referred to is for the purposes of identification marked "Exhibit No. 1."

Q. By referring to "Exhibit No. 1," here at the right, are the switches going in on the storage track to which you have referred, are they not?

A. Yes.

Q. And it is still further to the east, as the track curves to the north?

A. How is that?

Q. And it is further—it will be further east than this diagram shows to where the track curves north?

A. Yes.

Q. Now, I believe you said it was at least four or five car lengths from the point of the last switch that turns off from the
64 storage track to the point where the track begins to curve to the north?

A. I think it is four or five car lengths, is what I would judge it was.

Q. What is the length of the car?

A. Why average 36 foot; 40 foot is a long car, and they run from 33; of course there is longer than 40 but about 36 is the average length.

Q. Now, as you came around the curve and turned into the storage track, you were going about as fast as a man would walk in an ordinary walk, were you?

A. We could not have been going very much faster because we had about all we could handle right at that time.

Q. That is a very small engine, it is a yard engine, isn't it?

A. Yes.

Q. What were you doing on the front end—I believe you were on the front end of the cars which you were bringing along to the storage track?

A. Yes.

Q. What were you doing there?

A. I was riding there.

Q. Well, were you there to look out?

A. I was there to look out of course and make the coupling.

Q. Had you any information or notice that anybody was working down here along the fence between the cars on the storage track and the fence?

A. No, sir.

Q. Now, there is a point here where there is a white dot and two of these spaces across the storage track which I believe are intended to mean cars here, a little bit to the right of that is the
65 building; that is the machine shop, isn't it?

A. Yes.

Q. This white spot—that is approximately where the plaintiff was injured, was it not?

A. Well, it looks from here like it would be about where he was hurt.

Q. Now, the track to the north of the storage track goes through the machine shop, doesn't it?

A. Yes.

Q. And do you remember whether there were any cars on that track north of the storage track after the track passed through the machine shop?

A. Well, there was one setting there that I know of.

Q. That was a flat car or a box car?

A. I believe it was a box car.

Q. Loaded with sand, wasn't it?

A. Sand or something; they was carting away from it I know.

Q. It was being unloaded?

A. Either unloaded or loaded; that is, with dirt or something; I think it must have been being unloaded; I think the cartman was carting away from it as near as I can recollect.

Q. Do you say it was a box car or open car?

A. I am pretty near sure it was a box car.

Q. What about these seven cars that you say were standing on the storage tracks as you came in there; were they box cars or gondolas?

A. I think that they was mixed cars; that is, there was gondolas there and there was box cars too, in the seven.

Q. Isn't it a fact, Mr. Minnear, that a man standing at this point (indicating), which is about opposite the point which you have identified, as approximately the point where the plaintiff
66 was injured, and down near the fence—is it not a fact, that a man can see clear down here and see cars as they come around that curve, and on the storage track, if he looked?

A. Well, I will tell you; that would be a question that would depend a whole lot in my idea of it, if a man was looking, looking right for it, he might, and he might not because——

Q. Well, what I mean——

Mr. RECTOR: Let him answer, please. Go ahead.

WITNESS: Well, I would not know of course, without a demonstration.

Mr. RECTOR: Without that interruption.

Q. As a matter of fact it is possible to see clear down this storage track to the point where the track begins to curve; there is nothing to interrupt that view, is there?

A. Not along the fence.

Q. Yes, that is what I meant?

A. There is nothing to interrupt that view, no.

Q. As you came in, riding on the front end of the cars being pushed in on the storage track, you were looking down on the north side of the storage track, weren't you?

A. Yes.

Q. Did you see anybody there cross the track?

A. No, sir.

67 And also, HAROLD K. FROMM, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. RECTOR:

Q. I think your name is Harold Fromm?
A. Yes.
Q. I can't hear that; speak louder, please?
A. Yes, sir.
The COURT: Speak out so that these gentlemen can hear you.
WITNESS: Yes, sir.
The COURT: Fromm, you say?
WITNESS: F-r-o-m-m.
Q. Where do you live?
A. 104 West Second avenue.
Q. How?
A. 104 West Second avenue.
Q. Where are you working?
A. Jeffrey Manufacturing Company.
Q. Did you know Blagg when he was working there?
A. No, sir; I did not.
Q. Were you working there when he was injured?
A. Yes.
Q. And how long had you been working there before he was injured?
A. About a year and a half.
Q. And what had you been doing?
A. Clerk in the office.
Q. Where?
A. In the machine shop.
Q. That is the big building?
A. Yes.
Q. Near where he was hurt?
A. Yes.

68 Q. Well, were you at your work when he was hurt?
A. Yes.

Q. What was the first indication that you had that he was hurt?
A. Well, I heard somebody hollering outside.
Q. Did you go out then?
A. Yes.
Q. Did you notice where the brakeman was?
A. I never looked for the brakeman; I was looking from where the noise came from.
Q. Now during that day, how many cars had been standing on that storage switch?
A. I could not swear to that; all I know is what was standing on the track at the time.
Q. Well, how many were there?
A. There was about four or five there.
Q. On that track?
A. On the track that I could see, you know.
Q. That you could see?

A. That I could see, yes, sir.
Q. Well, did you notice any opening between the cars?
A. Yes.
Q. When did you see that opening first that day?
A. I never seen that opening until when I went out there to find out who was making the noise.
Q. You are now working for the company, are you?
A. Yes.
Q. How close is the track to the fence?
A. It is about between three and four feet.
Q. Didn't you make a statement in this case in writing as to what your testimony is?

69 Mr. ARNOLD: We object.

WITNESS: Yes, sir.

Mr. ARNOLD: Now, wait a minute, don't answer when I object. I move to strike out the answer.
The COURT: It is a preliminary question, probably.
(Previous testimony read.)
Mr. ARNOLD: He is seeking to impeach his own testimony.
Mr. RECTOR: I am not seeking to impeach him. I am going to get the truth out of him. That is all I am here for.
The COURT: Don't lead him.
Mr. RECTOR: I am not going to lead him.
The COURT: I suppose it partakes of the nature of cross-examination. As I say, it is a preliminary question. I do not know what he is going to call for.

Q. You said there was an opening between the cars?
A. Yes.
Q. Well, now, between what cars was that opening?
A. I cannot say — to that; it was about the fourth or fifth.
Q. From what end?
A. From the west end.
Q. And how long had those cars been standing there with that opening between them?
A. I can't say as to that.
Q. (Continuing:) —that day; you say you can't say?
A. I can't answer that; no, sir.

Q. I will ask you whether or not, you have observed prior
70 to the time when he was hurt, men working in and about those cars that were standing upon the track, the storage track?
A. Yes.
Q. What do you know about the custom of opening the cars so men could get through there?

Mr. ARNOLD: I object to that.
Mr. RECTOR: Withdraw the question.

Q. Had you seen the cars opened so that men could get through there?

A. I had seen fellows—open the cars and sometimes they would not push them clear together; they would leave an opening there.

Q. What have you seen men doing when they were going between the cars there?

A. Carrying lumber that way——

Q. How frequently during the six or seven months, before Blagg was hurt, did you observe that?

A. Well, just according to when they need the lumber, when they load cars.

Cross-examination.

By Mr. ARNOLD:

Q. You haven't talked with anybody connected with the company about this case, have you?

A. No, sir.

Q. You said that the distance from the track to the fence—from the storage track to the fence was about three feet; you mean from where to the fence?

A. It is about five feet from the rear to the fence.

Q. It is less than three feet from the side of the car to the fence, when that car is on the track?

A. Yes, sir; there is different width cars come in there, different widths and different heights.

71 Q. Very narrow space in there?

A. Yes.

Q. And the fence runs due east there without any break in it, doesn't it?

A. Up to the other side of the foundry and there is a bend in it there.

Q. Until it passes the machine shop, it is perfectly straight east and west?

A. Yes.

Q. Without any break or jut in it?

A. Yes.

Q. And there is nothing to interfere with the view of a person standing between the car on the storage track and the fence, from seeing clear down to the curve?

A. Not unless there is a good many cars on the track.

Q. Well, I mean looking between the fence and the cars, you could see clear down to the curve?

A. Yes.

Q. There is nothing to interfere with that view?

A. No, sir.

Q. You had seen on a few occasions before this accident when they were cleaning up any lumber or that sort of thing along the fence south of the storage track?

A. Yes.

Q. That had been a very few occasions?

A. Well, you know they keep their lumber out there, those 4 x 4's that they use to load locomotives on, sometimes they have them piled

up against the fence and most of the time it is between the track and runs through the machine shop and that storage track.

Q. That is the west of the machine shop and between that track that runs through the machine shop and the storage track?

A. Yes.

72–76 Q. Do you know anything about, on the occasions when men do work south of that track, that storage track, that the switch crew is notified?

A. No, sir.

Mr. RECTOR: That is you mean you don't know anything about it?

WITNESS: I don't know whether the switchman is notified about that or not.

77 And thereupon the plaintiff rested.

And be it further remembered, that the defendant to maintain the issues on its part to be maintained, offered and introduced in testimony on its behalf the following evidence to wit:

Mr. ARNOLD: We desire to read, first, the affidavit as to the testimony of the absent witness, James Christ. It should be explained to the jury, if your Honor please, that this affidavit was filed for a continuance and under the rules of the court, the plaintiff agreed that the affidavit might be read in lieu of his testimony, as the testimony he would adduce if he were present.

The COURT: I believe that is it, yes.

Mr. ARNOLD: Shall I read all of this affidavit?

Mr. RECTOR: No.

"Affidavit further says that the said James Christ if he were present, at the trial of this cause, or if this cause were con-
78 tinued until the defendant could take his deposition, would testify that on the twenty-ninth day of July, 1912, he was in the employ of The Jeffrey Manufacturing Company and on said day Harry O. Blagg, (who was known to Christ as Harry Davis), Lewis Naum, and himself were ordered and directed by Alonzo Coleman, track foreman of The Jeffrey Manufacturing Company at said time, (under whose direction they were then working), to clean up the lumber shed at the southwest corner of the yard; that Blagg, Naum and Christ thereupon commenced to sort the lumber and pile it outside of the shed; that in removing the lumber from said shed it was not necessary, nor did the instructions received by them then require that they cross the storage track or switch in defendant's yard; that during the progress of said work and contrary to the instructions given them Blagg without any orders or directions so to do and without the knowledge of Coleman, Naum, or Christ left the place at which he had been instructed to work and crossed to the south side of said storage track; that at said time it would have taken Blagg, Naum and Christ approximately two hours to have finished the work assigned to them in the lumber shed; and that Blagg, met with his accident at a place approximately one hundred feet southeast of said lumber shed."

79 And also

ALONZO COLEMAN, called on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. ARNOLD:

Q. What is your name?
A. Coleman—Alonzo Coleman—C-o-l-e-m-a-n.
Q. What is your business, Mr. Coleman?
A. Track man.
Q. Talk to the jury, please?
A. Track, foreman track.
Q. How long have you been a track foreman?
A. Well, about 22 years.
Q. You are with The Jeffrey Manufacturing Company now?
A. Yes.
Q. How long have you been with The Jeffrey Manufacturing Company?
A. Since the first day of last June, three years ago.
Q. You have been track foreman there during the period from that time until the present?
A. Yes.
Q. What had you been doing, prior to that time—just generally?
A. Till I was track foreman?
Q. Yes?
A. Why, foreman and roustabout over the country, and a little of everything.
Q. How long have you had experience in track foreman—I misunderstood you, I guess?
A. About 22 years.
Q. Well, had you had other experience in that line of work?
A. In railroad work?
Q. Yes?
A. Well, I started in railroad work in 1886.

80 Q. Well, just state in a general way what experience you had in railroad work.

A. Nothing, only track work; I have always worked on track work.
Q. Well, with what railroad?
A. The old C. S. & H.—well to start with the Z. & O. R., C. S. & H., Pennsylvania lines and the Jeffrey Company.
Q. Do you remember the date of the accident when the plaintiff was injured?
A. I do.
Q. Do you remember when that was?
A. I don't remember the exact date, no, sir.
Q. Do you remember what is called the storage track?
A. Yes, sir.
Q. Look at this (referring to "Exhibit No. 1") drawing, marked "Exhibit No. 1;" now at the east end here—that is the beginning of the storage track is it not, before it strikes, or as it strikes the switches?

A. Yes, sir.

Q. And then it runs up to the west side here near to the building, near the sand shed, marked the sand shed?

A. Yes.

Q. How much distance is there between the fence to the south of the storage track and the sides of cars when they are standing on the storage track, Mr. Coleman?

A. Well, there is—let's see, about from rail to the fence is about six feet and a half.

Q. Well, how much from the side of a car to the fence?

A. Well, the cars vary.

Q. Take an ordinary box car?

A. Well, you will have about better than four feet.

Q. You can take your seat again, Mr. Coleman. Coming now to the day of the accident, who were the men who were work-
81 ing in the lumber sheds there that day?

A. Blagg, Louis Naum and Jim Christ.

Q. Under whose direction were they working?

A. My own.

Q. What time in the day did they begin work there?

A. About 8:30 in the morning.

Q. What did they do in the shed?

A. Well, we worked——

Q. In the shed?

A. Why, in the beginning, we went up over what we call up over head and took down a lot of old rubbish, old furniture and so forth.

Q. Just go ahead and tell what they did?

A. Well, we cleaned that stuff down from over-head, threw it down into a pile and after we had taken that down, we was carrying it out to the west of the shed, throwing it in a pile there.

Q. Were you there at the time of the accident?

A. I was not.

Q. How long had you been gone?

A. Well, I could not say that exactly—not very long, I don't think.

Q. How long after the accident was it before you returned?

A. Well, I come back and the accident had happened; I started over to the hospital and the ambulance was backing up before I could get to the hospital, they had him loaded up and was gone.

Q. Did you know that there had been an accident when you came back?

A. No, sir, I did not.

Q. Not until you arrived there?

A. No, sir, I did not.

82 Q. Did you tell the plaintiff to go across the storage track and do any work to the south of the storage track, remove any stuff that was there?

A. I did not—not at the time he was there.

Q. What do you mean by that? You say not at the time he was there?

A. Well, because he had not completed the work that we was at.

Q. Well, what work had you told these men to do, if anything; what had you said to them?

A. Finished cleaning up in the lumber shed.

Q. What time was it in the afternoon that you left there before the accident?

A. Well, I don't just remember, something 2:30, 3:00 o'clock.

Q. State the condition of the work in and about the shed at the time you left there, as to whether it was finished or unfinished?

A. Well, it was unfinished; we didn't have all the lumber that we had throwed down from overhead in the pile; we didn't have that all out and we had special instructions from Mr. Arnold——

Mr. RECTOR: We object.

The COURT: Instructions from whom, you say?

WITNESS: Arnold; that is our plant engineer.

The COURT: Well, the question was what work was finished, I believe that is the question.

Mr. RECTOR: That is the question.

The COURT: That does not respond to the question; just answer the question; what work was unfinished?

83 Q. How long did it take to finish the work in and about the lumber shed?

A. Well, that took in the balance of that day.

Q. Who finished it?

A. The men that was—the other two men that was in the gang.

Q. You mean Naum and Christ?

A. Yes, sir.

Q. Did you know that Blagg had gone to the south of the storage track?

A. I did not.

Q. I wish you would state what was done about the storage track when any rubbish or material was removed from the south side of the track there?

A. What was done—or what——

Q. I mean if you would go to the yard crew or have anything done there about the track, just tell the jury what would be done?

A. Why, I always notified the switching crew when I am going to work on the tracks, or have been on the tracks and if I don't have an opportunity to notify them, I stay on the track and protect the men myself.

Q. What is that track, that storage track used for?

A. The storage track is about the limit of it—they are in and out there quite frequently; it is the principal track of the yards.

Q. Is there any loading or unloading done from the cars on that track?

A. No, sir.

Q. I wish you would state the facts as to whether or not men were in the habit of passing and repassing over that track and between the cars?

A. They were not.

Q. In the cases where you notified the yard crew what was to be done with reference to the cars then standing on the storage
84 track?

A. Well, if it was necessary for us to work in and about the cars, we would have the cars cut and spaced so that we would have room to work and protect ourselves.

Q. Do you know how many cars were on the storage track at the time of the accident?

A. I do not.

Q. Can you state approximately?

A. There was two to the west but I could not say as to the east.

Q. Then there was a space between these two tracks as to the west and those to the east?

A. There possibly was but I hadn't seen it.

Q. How much space was there west of the west car?

A. West of the west car?

Q. Yes?

A. West of the west car standing on the storage track at that time——

Q. I mean here, Mr. Coleman, how much space was there around in here at the west end of the storage track, west of the west car that was standing there?

A. Well, 75 or 100 feet.

Q. You had been subpœnaed as a witness on the part of the plaintiff, have you not, in this case?

A. I have a subpœna, yes, sir.

Q. Well, that was a subpœna to testify on behalf of Mr. Blagg?

A. I guess it is as far as I know.

Cross-examination.

By Mr. RECTOR:

Q. You say there was at this time about one hundred feet west of the west car that was standing——

Mr. ARNOLD: He said seventy-five to one hundred.

WITNESS: Seventy-five to one hundred

85 Q. Seventy-five to one hundred; you are sure of that, are you?

A. Well, it is—I go by rail lengths.

Q. I didn't ask you what you went by; I asked you if you were pretty sure of that?

A. Well, yes.

Q. All right. How many cars will that switch hold?

A. I could not say that.

Q. You don't know that?

A. I never paid any attention to that part of it.

Q. Well, don't you know it holds eight cars when it is full and when the cars are crowded close together?

A. I never counted the cars when it was full.

Q. I didn't ask you, if you ever counted them; I asked you if

you did not know that it only holds eight cars when they are crowded together. Now answer that yes or no?

A. I don't know.

Q. You don't know. All right. What is the length of the car?

A. Well, from 36 to 40 feet.

Q. Don't you know there was seven cars on that track?

Mr. ARNOLD: He said he didn't know, Mr. Rector.

Mr. RECTOR: Mr. Arnold, are you testifying or objecting?

Mr. ARNOLD: No.

Mr. RECTOR: Or objecting?

Mr. ARNOLD: Not objecting.

Mr. RECTOR: Well, then, don't suggest; if the questions don't suit, object.

Q. Don't you know there were seven cars standing on that switch on the afternoon in which Mr. Blagg was hurt?

A. I do not.

86 Q. All right. And that they were not close together?

A. I do not.

Q. That there was an opening between the third and fourth car of from four to six feet?

A. I do not.

Q. You are now employed by the Jeffrey Company?

A. Yes.

Q. You have been taking a very considerable interest in this case, haven't you?

A. I have not.

Q. Didn't you go over on the west side of the city last Friday to see Lou Naum, or whatever his name is?

A. I did.

Q. About this case?

A. Not exactly about this case in particular; the defendant wanted to know where he was.

Q. Who is the defendant?

A. Well, the Jeffrey Company, I suppose.

Q. Yes, I see. Well, you knew where he was didn't you?

A. No, sir, not until we went over there and hunted him up.

Q. I see. You made a statement in writing, did you not?

A. Yes.

Q. About this case, about three weeks ago?

A. Yes.

Q. And did you not at that time say "Naum runs a lunch counter near the B. & O. tracks on the west side?"

A. As near as I understood.

Q. Wait a minute. Did you not say at that time "Naum runs a lunch counter near the B. & O. tracks on the west side?"

A. That is what I said but——

Q. All right. That is what I asked you?

A. Yes, sir.

87 Mr. ARNOLD: I think the witness ought to have an opportunity to explain if he wishes.

Mr. RECTOR: I will give him all the opportunities he wants when he answers my question.

WITNESS: Well——

Mr. RECTOR: Is there an objection pending or not?

Mr. ARNOLD: I simply thought that the witness, if stopped in his answer, should be permitted to give his explanation.

M-. RECTOR: Give all the explanation he wants right now.

The COURT: If he wants to explain, but the question is whether he made the statement in the writing there.

Mr. ARNOLD: I understand that.

The COURT: If he desires to explain, he can do so.

WITNESS: There is no explanation to make. I made the statement.

Q. You made the statement. Well, then, why didn't you just tell the defendant, as you call it "That Naum was running a lunch counter near the B. & O. on the west side?"

A. I didn't know Naum's location.

Q. Any more definitely than that. You went over there with Mr. Grieves, didn't you?

A. I did not.

Q. Did you go by yourself?

A. No, sir.

Q. Who went with you?

A. I don't know; I don't just remember the gentleman's name.

Q. From where was he?

A. Out of the New Hayden building.

88 Q. What kind of a looking man was he?

A. Young fellow.

Q. But you don't know his name?

A. Kentz, I believe.

Q. What is his business?

A. I don't know that.

Mr. ARNOLD: We object to that.

Q. How long were you over there?

A. Why we was over there after we found Mr. Naum, I suppose, twenty—thirty minutes.

Q. You went over this day with him?

A. Yes.

Q. And have you interviewed any other witnesses for the defendant?

A. I never have.

Q. Now, did you not further say in the statement which you made "About two o'clock I told the men to finish cleaning up the shed then carry a few pieces of old corrugated iron up to a pile west of the shed——

A. I did.

Q. Wait a minute, sir, "and then we will go over to the Kilbourne and Jacobs fence and get this stuff in front of Kilbourne's fence?"

A. I did.
Q. That is the truth, is it?
A. That is the truth.
Q. And that is what you told them?
A. That is what I told them.
Q. All right, then why do you say to the jury, that you did not tell this plaintiff to go across the tracks?
A. Because he hadn't completed his work that we was to finish before we went over there.
Q. You added in your answer "Not at the time he was there." After you gave these directions you went away to attend to some other matters?
A. Yes, sir.

89 Redirect examination.

By Mr. ARNOLD:

Q. Mr. Coleman, how long had this man, Naum, worked under you before he had worked with you at the Jeffrey Company?
A. Oh, possibly two years, may be longer.
Q. With reference to this order or direction which you gave to the men there, I understood you to say that you told them to complete this work around the shed?

Mr. RECTOR: Now, just a moment. This is leading. I object to it.
Mr. ARNOLD: I am asking him what he testified to. This is preliminary.
Mr. RECTOR: He can say what he has to say.
Mr. ARNOLD: This is preliminary.
Mr. RECTOR: That this is preliminary don't excuse it from being leading.
Mr. ARNOLD: Well, wait until I finish my question.
Mr. RECTOR: I am making it right now.
The COURT: I have not heard the question yet.
Mr. ARNOLD: I have not finished it.
(Previous question read.)
Mr. RECTOR: I suggest to your Honor that is a leading question, you can tell as far as it has gone that it is leading, and it is an important matter here.
Mr. ARNOLD: If your Honor, please, I ask opportunity to finish the question.
The COURT: Well, it is not necessary to repeat what he said; if there is any question as to about what he said you can——
90 Mr. RECTOR: Let him say what he said.
The COURT: You can ask what he said in the record and then put a question to him if you desire.
Mr. ARNOLD: All right.

Q. Did you say in your cross-examination that you told the men there—these three men—to finish the work about the shed and that then we would go over and remove the stuff along the fence, the Kilbourne and Jacobs line fence?

A. I did.

Q. Now, how much work did you say there was to be done yet at the shed when you left there?

Mr. RECTOR: This is repetition. He was all over that.

Mr. ARNOLD: I know there is a situation here that is repetition to a certain extent but I will say to your Honor that it is perfectly proper, and it is not going to take any great time.

The COURT: I think he answered that a while ago.

Mr. RECTOR: He answered that question.

The COURT: But I do not know as it will do any harm to answer that question. Of course it is not necessary to repeat. I am not clear; I think he answered it. I am not certain about it.

Mr. ARNOLD: Something to the same effect.

The COURT: Well, answer the question.

Q. Read the question.

(Previous question read.)

Mr. RECTOR: I object as repetition. The witness has answered.

91 The COURT: It may be; I am not certain whether he answered it in just that form or not. Answer the question. Overruled.

WITNESS: I said possibly two hours' work—an hour and a half.

Q. Now, Mr. Coleman, if the men—the three men there have continued to do the work at the shed which you said was there to be done, what would have occurred before you had gone over to do the work along the fence to which you also referred in your direction to the men?

Mr. RECTOR: Now, just a minute. I do not know as he is a prophet; he is quite a witness but he is not a prophet.

The COURT: Read that, please.

(Previous question read.)

Mr. RECTOR: I object.

The COURT: The question is indefinite.

Mr. ARNOLD: I think the jury is entitled to know that situation. Now, here a man was started to work at a certain place, and then he said, well, later on had some other work. That was the practice or rule there when he did work in the other place at the——

Mr. RECTOR: There is no testimony as to the practice or rule there.

Mr. ARNOLD (Continuing:) —that the yard crew would be notified and the arrangement made so that it could be done, as it should be done, according to their practice. Now, I think——

The COURT: He testified to that in chief as I recollect.

92 Mr. ARNOLD: Yes, but what I am seeking to get at is, he told these men to do this work and then said later, we will go over and do this other work. But here a man left the work at which he had been assigned, and went away and did some work that he had not been directed to do at that time. If he had continued at the

work that he was doing, in the meantime arrangements would have been made about that track.

Mr. RECTOR: I move to strike——

Mr. ARNOLD: And notice given to the switching crew.

Mr. RECTOR: I move to strike all that out at this time and instruct the jury to disregard the statements of counsel.

The COURT: Well, I think the jury understands what the attorneys say here is not testimony. What the attorneys say to the court is not to be considered by you as evidence in the case. That is directed to the court.

Mr. RECTOR: I lodge an objection to the statement of counsel.

The COURT: This question here, I don't believe it is definite enough. I don't understand the question. It is so broad it may lead to a multitude of answers that may not have any applpication here at all. If there was anything to be done there, why he can ask this witness what it was, let him state what it was; if there was anything to be done before the men were to go across the track to do the work, let him state what it was.

93 Q. What, if anything, was to be done, Mr. Coleman, before the men did that work across the track?

Mr. RECTOR: I object to that as repetition. He has answered that.

The COURT: I don't recall that he has.

Mr. RECTOR: Why certainly, your Honor, he went all over that in chief.

Mr. ARNOLD: No, he did not.

Mr. RECTOR: Now, what is the use of sitting here and repeating this question.

The COURT: Well, answer the question; overruled.

Mr. RECTOR: Except.

WITNESS: Overruled? I am to answer that question?

The COURT: If you can.

Q. Yes, the court says, answer the question.

A. Well, we was to finish cleaning the lumber shed.

Q. Well, what, if anything, was to be done about the track, the storage track there before the men were to work over on the other side?

Mr. RECTOR: I object.

The COURT: Overruled. Answer.

WITNESS: Why there was some stuff laid just outside of the door, to the south of the shed, we were working in there, corrugated iron and some rubbish there that was to be cleaned up yet before we was to go across the tracks.

Q. Well, what, if anything, were you to do with reference to the switching crew and the cars on the track before the men were to work over there?

94 Mr. RECTOR: I object.

The COURT: He answered that in chief.

Mr. ARNOLD: Not as applied to this particular situation.

Mr. RECTOR: Certainly he did.
The COURT: I think he did.
Mr. ARNOLD: He stated the general practice but not with reference to this particular time.
Mr. RECTOR: Well, now, this particular time, that leaves this witness to prophesy, not testify.
The COURT: Well, no, he can testify as to what——
Mr. RECTOR: What was to be done.
The COURT: What their duties were in that regard.
Mr. RECTOR: He can testify as to instructions given and things that occurred but what was to be or might have been, is another matter.
The COURT: He can testify as to the facts, as to what they were to do there in that regard.
Mr. RECTOR: He may testify to a fact?
The COURT: My recollection is, however, that he went into that fully in chief.
Mr. ARNOLD: Not as applied to this particular time.
Mr. RECTOR: Then he ought to have done it, if it is competent.
The COURT: I think he was asked that, the substance of it, or i that regard; he said I always notified the switching crew when I have men on track; if not I stay on the track and protect the men myself. He says in all cases, says he always does.
95–110 Mr. ARNOLD: Well, all right.
The COURT: Is that all?
Mr. ARNOLD: That is all.

111 And thereupon the defendant rested.

And there being no further testimony, the foregoing was all of the testimony offered, introduced and admitted on behalf of the plaintiff and on behalf of the defendant on this trial of this cause.

And thereupon the defendant filed with the court and sub-
112 mitted to the court, certain special instructions in writing with the request that the court give each and all in charge to the jury, not as a whole or as a series, but as separate and distinct propositions of law, requesting that the same be given before argument of counsel to the jury; which said special instructions, with the caption omitted, are in the words and figures following, to wit:

Now comes the defendant at the conclusion of the evidence and presents the following written instructions to the court on matters of law, and requests that said instructions and each of them be given to the jury separately, but not as a whole, before the arguments of counsel. Said instructions are numbered one to eight inclusive, and are hereto attached.

ARNOLD & GAME,
W. W. CARLISLE,
Attorneys for Defendant.

Defendant's Request No. 1.

The defendant was not an insurer of the safety of its employes. In order that plaintiff shall be entitled to recover against the defendant, as prayed for in the petition, it must be made to appear by a preponderance of the evidence that the defendant was guilty of negligence, that is, that it failed to exercise due care. Defendant was only required to exercise ordinary care, that is, that degree of care which ordinarily careful persons under the same or similar circumstances or conditions are accustomed to use.

113 *Defendant's Request No.* 2.

Plaintiff charges that the defendant was negligent in the several particulars set forth in the petition. Actionable negligence for which the plaintiff may recover is the failure of the defendant to exercise that degree of care which ordinarily careful persons are accustomed to use under the same or similar circumstances or conditions. The defendant was not the insurer of the plaintiff's safety, nor does a presumption arise that the defendant was negligent because plaintiff was injured nor can negligence be inferred from the happening of the accident.

If the injury to plaintiff resulted directly from his own negligence, that is, his failure to exercise reasonable and ordinary care for his own safety, considering his age, experience, knowledge and the instructions he may have received, then plaintiff cannot recover and your verdict should be for the defendant.

If you find from a preponderance of the evidence that the plaintiff was not injured by reason of his failure to exercise reasonable and ordinary care for his own safety, then before you can find in favor of the plaintiff you must find that the defendant failed to exercise reasonable and ordinary care in some one or more of the several particulars set forth in the petition, that is, that it failed to exercise that degree of care which ordinarily careful persons are accustomed to use under the same or similar circumstances and conditions.

114 *Defendant's Request No.* 3.

Plaintiff by entering the employ of the defendant and engaging in the work which he was employed to perform, assumed the ordinary and usual risks of injury incident to such employment. He is presumed to have had knowledge of those circumstances and conditions which men of ordinary skill and prudence, under the same or similar circumstances exercising ordinary care for their own safety, would never had. It was the duty of plaintiff to use his senses to the same extent that men of ordinary care and prudence would, under the same or similar circumstances, to discover existing dangers; and if plaintiff's injury was caused by any danger which was one of the ordinary risks incident to his employment and which was known to him, or which could have been known to him by the

exercise of reasonable and ordinary care on his part, then plaintiff cannot recover, and your verdict should be for the defendant.

Defendant's Request No. 4.

Plaintiff upon entering the employment of the defendant assumed the ordinary risks of the business incident to his employment which, considering his age, intelligence and experience, he knew, or by the exercise of ordinary care could have known. Included in the risks assumed by him was the possibility of his receiving an injury through the negligence of a fellow servant engaged in the same general employment.

115 Fellow servants are those who are in the employ of the same master, engaged in the same common enterprise, and who are employed to perform duties and services tending to accomplish the same general purpose and having no authority, direction or control over any employe engaged in the same general employment.

If you find from the evidence that plaintiff's injury was caused by the negligence of a fellow servant, then plaintiff cannot recover, and your verdict shall be for the defendant.

Defendant's Request No. 5.

Plaintiff charges that he was injured as the result of the negligence of the defendant in the particulars set forth in his petition. The defendant, by its answer, denies that it was negligent in any of these particulars. The burden of proof is upon the plaintiff, and it is incumbent upon him to prove by a preponderance of the evidence that the defendant was negligent in some one or more of the particulars set forth in the petition. You cannot consider any charge of negligence other than those set forth in the petition, and plaintiff is not entitled to recover herein against the defendant upon any ground of negligence not set forth in the petition.

Defendant's Request No. 6.

The defendant charges that the plaintiff was injured as the direct result of his own negligence. If you find that the injury

116 of the plaintiff resulted from his own negligence, that is, by failure to exercise reasonable care for his own safety, considering his age, experience, knowledge and the instructions he received, then he cannot recover and your verdict should be for the defendant.

Defendant's Request No. 7.

If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant.

Defendant's Request No. 8.

If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant, unless you find the contributory negligence of plaintiff is slight and the negligence of the defendant is gross in comparison, in which case the damages shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff.

And thereupon, before argument of counsel to the jury, the court charged the jury as follows, to wit:

The COURT: Gentlemen of the Jury, the defendant has requested the court to give you before argument of counsel to the jury, certain special instructions, some of which I give you, as follows:

First. The defendant was not an insurer of the safety of
117 its employes. In order that plaintiff shall be entitled to recover against the defendant, as prayed for in the petition, it must be made to appear by a preponderance of the evidence that the defendant was guilty of negligence, that is, that it failed to exercise due care. Defendant was only required to exercise ordinary care, that is, that degree of care which ordinar-y careful persons under the same or similar circumstances or conditions are accustomed to use.

Second. Plaintiff charges that the defendant was negligent in the several particulars set forth in the petition. Actionable negligence for which the plaintiff may recover is the failure of the defendant to exercise that degree of care which ordinarily careful persons are accustomed to use under the same or similar circumstances or conditions. The defendant was not the insurer of the plaintiff's safety, nor does a presumption arise that the defendant was negligent because plaintiff was injured nor can negligence be inferred from the happening of the accident.

If the injury to plaintiff resulted directly from his own negligence, that is, his failure to exercise reasonable and ordinary care for his own safety considering his age, experience, knowledge and the instructions he may have received, then plaintiff cannot recover and your verdict should be for the defendant.

If you find from a preponderance of the evidence that the plaintiff was not injured by reason of his failure to exercise reasonable and ordinary care for his own safety, then before you can find in favor of the plaintiff you must find that the defendant failed to
118 exercise reasonable and ordinary care in some one or more of the several particulars set forth in the petition, that is, that it failed to exercise that degree of care which ordinarily careful persons are accustomed to use under the same or similar circumstances and conditions.

Fifth. Plaintiff charges that he was injured as the result of the negligence of the defendant in the particulars set forth in his petition. The defendant by its answer denies that it was negligent in

any of these particulars. The burden of proof is upon the plaintiff, and it is incumbent upon him to prove by a preponderance of the evidence that the defendant was negligent in some one or more of the particulars set forth in the petition. You cannot consider any charge of negligence other than those set forth in the petition, and plaintiff is not entitled to recover herein against the defendant upon any ground of negligence not set forth in the petition.

Mr. RECTOR: If your Honor please, objection to last charge will be withdrawn.

The COURT: Sixth. The defendant charges that the plaintiff was injured as the direct result of his own negligence. If you find that the injury of the plaintiff resulted from his own negligence, that is, by failure to exercise reasonable care for his own safety, considering his age, experience, knowledge and the instructions he received, then he cannot recover and your verdict should be for the defendant.

Mr. RECTOR: The last, the one we objected to, we will withdraw that objection.

119 The COURT: How is that?

Mr. RECTOR: I think we objected to one here which you asked us about particularly, No. 8, we will withdraw our objection to that.

The COURT: No. 8.

Eight. If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant, unless you find the contributory negligence of plaintiff is slight and the negligence of the defendant is gross in comparison, in which case the damages shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff.

Now you may proceed with your argument.

And thereupon Mr. Rector, on behalf of the plaintiff, in opening, argued to the jury.

And thereupon during the opening argument of counsel for the plaintiff to the jury, there occurred the following:

Mr. ARNOLD: Note our exception to the refusal to give requests 3 and 4 and 7.

And thereupon at the conclusion of the opening argument of counsel for the plaintiff, on behalf of the defendant, Mr. Arnold argued to the jury.

And thereupon a recess was taken until 1:30 o'clock p. m. of same day.

Tuesday Afternoon Session, November 25, 1913.

120 And thereupon on behalf of the defendant, in closing, Mr. Carlisle argued to the jury.

And thereupon, on behalf of the plaintiff, in closing, Mr. Rector argued to the jury.

And thereupon, at the conclusion of the argument of counsel to the jury, the court charged the jury in writing as follows, to wit:

Charge.

EVANS, *J.:*

Gentlemen of the Jury: The plaintiff in this case, Harry O. Blagg, by his next friend, Joseph M. Downing, brings this action against the defendant, the Jeffrey Manufacturing Company, and seeks by his action to recover against the defendant damages for injury which the plaintiff alleges he sustained by reason of the negligence of the defendant. The plaintiff in substance in his petition states that on the ninth day of June, 1912, that he was engaged as an employe of the defendant, the Jeffrey Manufacturing Company, which defendant company he alleges employs hundreds of men regularly in the same business and in and about the same establishment, and has not paid into the State Insurance Fund any premium provided by the act of the General Assembly, known as the Workmen's Compensation Law. He further alleges that in the conduct of its business the defendant used many buildings and many acres of land; that on the south side of the grounds and
121 lands used in the business of defendant was a railroad track and switch used for the purpose of storing cars; that to the knowledge of the defendant said switch would hold eight ordinary freight cars, and no more, when said cars were crowded closely together; that at the time of said injury, to the knowledge of defendant, there were seven freight cars standing upon said switch and between the fourth and fifth cars was an opening of about three feet, left for the use of employes of the defendant that might have occasion to pass between the ends of said cars, when engaged in the performance of their duty; that between said switch and the fence on the extreme south side of said lands at the times hereinafter mentioned were two piles of lumber; that the plaintiff then employed by the defendant herein had been directed by the defendant to assist in removing said lumber to a point on the north side of said switch; that in so doing it was necessary, as the defendant well knew, and as the plaintiff had been directed and instructed by defendant to do, for the plaintiff to pass through said opening between said fourth and fifth cars on said switch; that while plaintiff following said directions was engaged in said labor and as he was between said cars, the defendant had caused to run against the car standing on the east end of said switch a long cut of cars pushed by an engine, the property of the defendant, with the result that the cars on said switch were jammed and pushed together, the plaintiff was
122 caught about the hips between said fourth and fifth cars. He further alleges that the defendant negligently and carelessly had in charge of said cut of cars, the exact number of which cars being to the plaintiff unknown, but a single man whose duty it was to control the movement of said cars, give the necessary signals to the engineer running said locomotive, make the necessary couplings and uncouplings between said cars, watch the tracks on which said cars were moving, and give warning to those who might be in danger of injury, and do any and all other things incident to the control or

movement of said cut of cars; that at said time the plaintiff had no knowledge that said cut of cars was about to be pushed into said switch or against said east car, and that there was no signal or warning of any kind given to plaintiff of the intention of defendant so to do; that as a result of the injury then and there received the joint of the plaintiff's right hip and leg was mashed, crushed and permanently injured, to such an extent that the same was destroyed and subsequently removed, and the joint and bones of the left hip and leg were so mashed and injured as to render the plaintiff unable to use said leg; that plaintiff, because of said injury, was made to suffer great pain of body and distress of mind, and said suffering since said date has been continuous and will be permanent; that plaintiff throughout the rest of his life will be and remain permanently a cripple, unable to walk, or to engage in his usual or ordinary avocation of a laboring man; that prior to said date
123 the plaintiff was a strong, able-bodied, vigorous man and was earning about two dollars per day. He further alleges that said injury to plaintiff resulted solely from the negligence of the defendant in the following respects, to wit:

First. In causing said cut of cars to be pushed upon and against the car standing upon said switch while plaintiff was between said cars.

Second. In failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or against the car on the east end thereof.

Third. In having an insufficient number of men or employes engaged in the handling and switching of said cut of cars.

The plaintiff prays damages against the defendant in this action in the sum of thirty-five thousand dollars.

For answer to the petition of the plaintiff, defendant says it admits that plaintiff is nineteen years of age and brings this action by Joseph M. Downing, his next friend; admits that the defendant is a corporation organized under the laws of Ohio and doing business in Columbus, Ohio; it admits that on the nineteenth day of June, 1912, and long prior thereto the defendant was engaged in the manufacturing business at Columbus and was employing many men regularly in the same business in and about the same establishment and had not paid into the State Insurance Fund any premiums
124 provided by the act of the General Assembly known as the Workmen's Compensation Law. The defendant further admits in its answer that in the conduct of its business is used several buildings and several acres of land; that on the south side of the grounds or lands used in the business of the defendant was a railroad track or switch used for the purpose of storing cars; that on the twenty-ninth day of July, 1912, there were seven freight cars standing upon said switch and between the fifth and sixth cars from the east was an opening of about three feet; that between said switch and the fence on the extreme south side of said lands were two piles of lumber; that while plaintiff was passing between said cars the defendant caused to run against the cars standing on the east end of said switch a cut of cars pushed by an engine, and said cars

which were standing on said switch were pushed together; the plaintiff was caught about the hips between said fifth and sixth cars. Defendant further admits that said engine and cars were in charge of a conductor whose duty it was to control the movement of said cars and give signals to the engineer running said locomotive, make the necessary couplings and uncouplings between said cars, watch the tracks on which said cars were moving and do any and all other things incident to the control or movement of said cut of cars; and that no signals of warning were given to plaintiff. The defendant further admits that as a result of said accident plaintiff's hips and legs were injured; that plaintiff suffered pain of body; that
125 prior to said accident plaintiff was an able-bodied man and was earning about a dollar seventy-five cents per day. The defendant further answering herein denies each and every allegation and averment in said petition contained not herein admitted to be true.

The answer of the defendant further contains, as alleged therein, the first defense and second defense. The substance of the first defense is that the plaintiff knew the circumstances and conditions surrounding himself at the time of his injury, or should have known them by the exercise of reasonable and ordinary care and that the injury sustained by him was by reason of the risks of injury assumed by him at said time and place. The second defense is in substance a denial by defendant that it was guilty of any negligence or carelessness, and further alleges that if it was negligent in any of the respects alleged in the petition that the plaintiff himself was guilty of negligence which directly contributed to and was directly the proximate cause of his injury.

In respect to said first and second defenses so specified in the answer of the defendant, I charge you that under the law of the State of Ohio that was in force and operation at the time of the injuries herein complained of, it was provided that all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment who shall not pay into the State Insurance Fund the premium provided by
126 this act shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents, or employes, and that in such action the defendant shall not avail himself or itself of the following common law defenses, to wit, the defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence. That by operation of said statute, the substance of which I have heretofore stated, the defense of the assumption of risk by the plaintiff and the defense of the fellow servant rule or the defense of contributory n-gligence cannot operate as a defense in this case, you may, however, consider the second defense so far as the denial therein contained that the defendant was guilty of any negligence or carelessness, and you may also consider such in so far as it may have application under the eighth special request of the defendant which I have heretofore given to you.

To the answer of the defendant the plaintiff denies each and every allegation of the answer of the defendant contained in the alleged first and second defenses thereof. Such are the pleadings in the case, gentlemen of the jury, and from the pleadings in the case are to be determined the issues that are involved in the trial of the case. The action is one in negligence in which the plaintiff charges
127 that his said injuries were caused by the negligent acts of defendant and he seeks to recover damages against the defendant therefor. The specific acts of negligence charged by the plaintiff are, first, that the defendant caused said cut of cars to be pushed upon and against the cars standing upon said switch while plaintiff was between said cars.

Second. That the defendant failed to warn and notify the plaintiff of the intention of defendant to push said cars into and upon said switch or against the car on the east end thereof.

Third. That the defendant had an insufficient number of men or employes engaged in the handling or switching of said cut of cars.

The defendant denies that plaintiff's said injuries were caused by the negligent acts of defendant. This denial of the defendant puts in issue the question as to whether or not the defendant was negligent as charged in the petition, and puts in issue the charge of plaintiff that defendant's negligent acts caused the injuries of which plaintiff complains. Hence, the burden of proof devolves upon the plaintiff before the can recover to prove by a preponderance of the evidence—which means a greater weight of the evidence—that the defendant was negligent in the respects complained of in the petition—or some one or more of them—and that the injury the plaintiff sustained resulted directly from such negligence as the proximate cause thereof. If plaintiff has proved by a preponderance of the evidence that defendant was negligent in any one or all of the
128 particulars complained of and if such negligence was the proximate cause of the injury to plaintiff of which he complains, in that event the plaintiff would be entitled to your verdict.

If the defendant was negligent in the particulars complained of, or in any of them, or if defendant was negligent, but if the negligence of the defendant was not the proximate cause of plaintiff's said injuries, then in that event the plaintiff could not recover and your verdict should be for the defendant. In determining these questions as well as all other questions submitted to you, you will carefully consider all the testimony before you, giving it all such weight as in your best judgment it is entitled to. You are the sole judges of the facts in the case and the weight of the evidence and of the credibility of the witnesses. In weighing the testimony you should consider all the facts and circumstances, and in weighing the testimony of the witnesses you may properly take into account any interest, if any, of the witnesses in the result of the trial, his appearance upon the witness stand, his manner of testifying, his apparent intelligence or lack of intelligence, his opportunities for seeing or knowing the things that he has testified to, and from these and all other circumstances appearing in connection with the testi-

mony on the trial the jury has the right to determine which witness is more worthy of credit and to give credit accordingly, and you will determine all the facts from the evidence in the light of the law as the court instructs you. Negligence in the law is defined
129 as being the want of ordinary care, and may consist in doing something which ought not to be done or in not doing something which ought to be done. Ordinary care means that degree of care which persons of ordinary care and prudence are accustomed to use and employ in the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished. As I have heretofore stated to you the negligent acts complained of in order to enable the plaintiff to recover must have been the proximate cause of his injury. By the term "proximate cause" is meant the cause which directly produced the injury.

The relation between the plaintiff and the defendant was that, known in the law, as master and servant. It was the duty of the defendant as such master to use ordinary and reasonable care in providing for its employes a safe and suitable place in which to do their work. The defendant was not required to use extraordinary care, nor was it required to do what was unreasonable or impractical, taking into consideration all the circumstances. It is required to use what would be reasonable care under the circumstances of the case. It is claimed by plaintiff, then employed by the defendant, that he was directed by defendant through a foreman to assist in removing certain lumber from a point between such switch and a fence on the south side of said land to a point north of said
130 switch, and that in so doing it was necessary and that he was so directed to do, for plaintiff to pass through an opening between the fourth and fifth cars on said switch. He claims that this opening between said cars was left for the use of employes of defendant that might have occasion to pass between the ends of said cars in the performance of their duties. But he claims that while he was so employed in said labor and as he was between the cars that defendant caused to run against the car standing on the east end of the switch a long cut of cars pushed by an engine which resulted in the cars being jammed and pushed together and that he was caught about the hips and received the injuries complained of. If you find by preponderance of the evidence that the plaintiff was directed by a foreman of the defendant company as a part of his duty to assist in removing the lumber to the north side of said switch and if in so doing it was necessary for plaintiff to pass through said opening between said cars on said switch and if plaintiff was performing such duty and in so doing you find he was following the instructions of the foreman, in so doing, then, I charge you that under the law it would be the duty of the defendant to give notice or some warning to the plaintiff while so engaged of its intention to run said cars upon said switch.

It is the duty of a company operating locomotives and cars to make such regulations or provisions for the safety of its employes as

will afford them reasonable protection against the dangers
131 incident to the performance of their respective duties. If said foreman of said company was by the company put in charge of a set of hands whose business it was to remove lumber or other material from one part of the company's yards to another, and if it was necessary in this case, and if the plaintiff had been instructed by the foreman, to go across said switch and said fence to some place on the opposite side of said switch. If the plaintiff was then under the instruction of said foreman in the performance of said duties, then it would be the duty of the foreman in putting the plaintiff to work under such circumstances, if you find he so did, to use rea-onable care to protect the plaintiff while thus engaged from the dangers arising from the switching of cars upon said track and it would be the duty of the foreman under such circumstances, if such you find, to have taken proper steps to have given notice or some warning to the plaintiff of the intention to move said cars at said time and place, and if you find by a preponderance of the evidence that plaintiff was at said time and place acting under the directions and instruction of said foreman, and if you further find that said cars were moved upon said switch by the defendant without any notice or warning of the approach of said cars at said time and place, or if you further find that the defendant was negligent in not having a sufficient number of men or employes engaged in the hand-
132 ling and switching of said cut of cars to assist in the running of the same or in giving signals for the protection of employes working on or about said track, and if you further find that the defendant was negligent in any of the particulars specified in the petition and that such negligence was the proximate cause of the injury to the plaintiff, in that event your verdict should be for the plaintiff.

It is your duty to look to the evidence under all the circumstances of the case under the instructions of the court and determine if the defendant was negligent as charged by plaintiff in all or any one or more of the particulars set forth in the petition, and if you find that the defendant was negligent in all or any of said particulars then you will look to the evidence and determine if said negligence was the proximate cause of the injury sustained by the plaintiff. If upon the other hand, if the plaintiff has failed to prove any of the acts of negligence alleged by him in his petition against defendant, or if you find that the defendant was negligent in some one or all of said particulars, but if you find that the negligence of the defendant was not the proximate cause of plaintiff's injury, then your verdict should be for the defendant.

If you find that the defendant is liable under the evidence, and under the instructions of the court, you will award the plaintiff such sum as damages as will fairly and justly compensate him for his injury. The measure of his damages is compensation, and only compensation. You will take into consideration the
133 nature of the injury, the extent of it, the pain which he has suffered. You will consider the effect of the injury, the per-

manency of it, the effect of the injury upon his bodily strength, his distress of mind, if any, and upon his capacity to labor and earn a living; the time he has actually lost by reason of his injuries, and all the circumstances, and you will calmly and deliberately apply your best judgment to the evidence in the case; and if you find in favor of the plaintiff you will award to him such damages as will fairly and justly compensate him for his injury; but not, in any event, in excess of the amount prayed for in the petition.

In determining the issues you will be governed by the testimony that you have heard introduced here before the court upon the trial in the light of the law as the court has instructed you. It is your duty to give the testimony your careful and deliberate consideration in order that when you reach your verdict you may do justice between the parties.

I now submit this case to you. You will retire to your jury room, select one of your number foreman, and when you have agreed upon a verdict, have your foreman sign it and return it into court. Forms of verdicts will be furnished and sent to your jury room.

You may now retire.

EVANS, *J.*

And thereupon before the jury retired, the defendant excepted generally to the charge as given, and to each and overy part and paragraph thereof.

134 And thereupon before the jury retired the plaintiff excepted generally to the charge as given, and to each and every part and paragraph thereof.

Mr. ARNOLD: We request that the affidavit of Mr. Grieves as to the testimony of James Christ, filed herein on the twenty-fourth day of November, 1913, be sent to the jury with the pleadings and exhibits in the case.

The COURT: I don't think that ought to go out.

Mr. ARNOLD: We except. We understand the motion is overruled and note our exceptions.

And thereupon, after due deliberation, the jury returned into court its verdict in writing, which, with the caption omitted, is in the words and figures following, to wit:

We, the jury, being duly impaneled and sworn, find the issues in this case in favor of the plaintiff, and assess the amount due to the plaintiff from the defendant at the sum of $25,000, twenty-five thousand dollars.

THOMAS JERMAN, *Foreman.*

And thereupon within three days thereafter, the defendant filed its motion for a new trial, which said motion, with the caption omitted, is in the words and figures following, to wit:

Motion for a New Trial.

Now comes the defendant and moves the court to vacate and set aside the verdict of the jury in favor of the plaintiff rendered herein on the twenty-fifth day of November, 1913, and to grant a
135 new trial in this action, for the following reasons and causes affecting materially the substantial rights of the defendant, to wit:

First. Excessive damages appearing to have been given under the influence of passion or prejudice, and aggravated by the circumstances attending the appearance of the plaintiff at the trial far beyond what would be reasonable compensation to the plaintiff for his loss of time, loss of earning power and reasonable and proper allowance for pain and suffering.

Second. Errors of the court in the admission of evidence offered by the plaintiff, to which the defendant at the time excepted.

Third. Errors of the court in the exclusion of evidence offered by the defendant, to which the defendant at the time excepted.

Fourth. Errors of the court in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the defendant before the arguments in said cause, to which the defendant at the time excepted.

Fifth. Errors of the court in the charge to the jury at the close of the arguments of said cause, to which the defendant at the time excepted.

Sixth. Error of the court in refusing to send to the jury room for consideration by the jury during its deliberation the affidavit of W. A. Grieves filed herein, setting forth the testimony of James Christ, and which was during said trial read as the evidence of said Christ, to which the defendant at the time excepted.

136–139 Seventh. Error of the court in charging the jury that under the provisions of the Ohio Workmen's Compensation Law, being the act of the General Assembly of the State of Ohio approved June 15, 1911 (102 O. L., 524), to the effect that the defendant could not avail itself of the first and second defenses set forth in its answer herein, and that the same could not operate as defenses herein, for the reasons that said act is invalid and void, and the provisions thereof removing the defenses of the assumption of risk, fellow servant rule and contributory negligence are void, as violating the provisions of the Constitution of the State of Ohio and the several and respective amendments thereof and thereto, and the provisions of the Constitution of the United States and of the several and respective amendments thereof and thereto.

Eighth. Errors of law occurring at the trial of said cause, to which the defendant at the time excepted.

Ninth. That the verdict is not sustained by sufficient evidence and is contrary to law.

(Signed) W. WILSON CARLISLE AND
ARNOLD & GAME,
Attorneys for Defendant.

140 And thereupon the court found as per entry filed herein on December 29, 1913, which said entry, with the caption omitted, is in the words and figures following, to wit:

"This cause came on to be heard on the motion to set aside the verdict and for a new trial, and the court being of the opinion that the damages assessed by the jury are excessive to the amount of nine thousand ($9,000) dollars, and the plaintiff here in court now consenting to remit the excess aforesaid, thereupon the said sum of nine thousand ($9,000) dollars being remitted and deducted from the said verdict, the court overruled the motion for a new trial, to which ruling the defendant excepts.

"It is therefore considered, ordered and adjudged by the court that the plaintiff recover from the defendant the sum of sixteen thousand ($16,000) dollars, the residue of the damages by the jury assessed, together with his costs herein expended, taxed at $—; to which ruling, order and judgment the defendant excepts.

"(Signed) HARRY O. BLAGG."

And thereupon the court overruled said motion for a new trial, filed as aforesaid by said defendant, and entered up judgment on said verdict in favor of said plaintiff and against said defendant in "the sum of $16,000, the residue of the damages by the jury assessed, together with his costs herein expended, taxed at $—;" to

141 which ruling of the court in overruling said motion for a new trial, and in entering up judgment as aforesaid, the defendant at the time excepted and still excepts; and on the sixteenth day of January, A. D. 1914, defendant desiring that all of the evidence shall be reproduced verbatim, filed this its bill of exceptions in said cause.

And thereupon the clerk of said court having forthwith notified the plaintiff of the filing of this bill of exceptions, and no objection or amendment to said bill of exceptions having been filed by said plaintiff, said clerk on the twenty-sixth day of January, A. D. 1914, presented to Hon. Marcus G. Evans, trial judge as aforesaid, this bill of exceptions, for allowance and signature by said court as provided by statute.

And thereupon the court received this bill of exceptions on the twenty-sixth day of January, A. D. 1914, and said court did on the twenty-sixth day of January, A. D. 1914, certify that the foregoing was all of the evidence offered, introduced and admitted on behalf of the plaintiff and on behalf of the defendant on this trial of this cause, and did allow, sign and seal this bill of exceptions as provided by statute, and did immediately transmit the same to the office of the clerk of said court, to be made a part of the record herein, but not spread at large upon the journal, according to the statute in such case made and provided, all of which is accordingly done as of said September Term, A. D. 1913, of said court.

MARCUS G. EVANS,
Trial Judge.

142 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 27th day of May, A. D. 1914.

[Seal Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

143 In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

To the Hon. Hugh L. Nichols, Chief Justice of the Supreme Court of the State of Ohio:

Now comes The Jeffrey Manufacturing Company, a corporation organized and existing under the laws of the State of Ohio with its principal office and place of business in the City of Columbus in said State, and alleges that the defendant in error Harry O. Blagg, by Joseph M. Downing, his next friend, brought this action for the recovery of damages for personal injuries received by the said Harry O. Blagg while in the employment of the plaintiff in error and that upon the trial of this cause judgment was rendered in favor of the defendant in error and against plaintiff in error in the sum of Sixteen Thousand ($16,000.00) Dollars.

Plaintiff in error further alleges that in this cause on the 28th day of April 1914 final judgment was rendered against your petitioner by the Supreme Court of the State of Ohio, that being the highest court of law or equity in the said State of Ohio, wherein it was adjudged that the Common Pleas Court of Franklin County, Ohio, did not err at the trial of this cause in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury; that said Court of Common Pleas did not err at said trial of this cause in charging the jury that the provisions of the act of the General Assembly of the State of Ohio passed May 31, 1911 and approved by the Governor June 15, 1911, entitled "An

act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards," (102 Ohio Laws 524), was the law of the State of Ohio and was in force and operation at the time the injuries complained of were received by the defendant in error, and that by virtue of the provisions of said law plaintiff in error could not at said trial avail itself of the common law defenses of the assumption of risk, fellow servant rule and contributory negligence rule, and said defenses of assumption
144 of risk, fellow servant rule and contributory negligence could not operate as defenses for the plaintiff in error at said trial; wherein it was also by said Supreme Court of the State of Ohio held that the Court of Appeals of Franklin County, Ohio, did not err in affirming said rulings and judgment of said Court of Common Pleas; and wherein it was by said Supreme Court of the State of Ohio further adjudged that said act of the General Assembly is a valid law and is not in violation of and repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In each and all of which rulings and judgments said Supreme Court of the State of Ohio erred to the prejudice of plaintiff in error.

All of which appears in the record, opinion and final judgment of said Supreme Court of the State of Ohio affirming the judgments of the Court of Appeals and Court of Common Pleas of Franklin County, Ohio, and remanding this cause to said Court of Common Pleas for execution upon said judgment.

Wherefore your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment reversed, and said cause remanded to said Court of Common Pleas for further proceedings; and your petitioner will ever pray.

THE JEFFREY MANUFACTURING COMPANY,
By H. B. ARNOLD &
W. WILSON CARLILE,
Its Attorneys.

The writ of error as prayed in the foregoing petition is hereby allowed this 7th day of May 1914, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $22,000.00.

Dated at the City of Columbus, Ohio this 7 day of May 1914.

HUGH L. NICHOLS,
Chief Justice Supreme Court of the State of Ohio.

145 [Endorsed:] No. 14564. In the Supreme Court of the State of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next

friend, Defendant in Error. Petition for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed May 7, 1914. Supreme Court of Ohio, Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

146 In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

Now comes the plaintiff in error in connection with the petition for a writ of error herein and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio, in the above entitled action there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgments of the Court of Common Pleas and the Court of Appeals of Franklin County, Ohio, and in refusing to reverse said judgments and remand this cause to the Court of Common Pleas of Franklin County Ohio for further proceedings.

Second. The judgment of the Supreme Court of the State of Ohio in this cause is repugnant to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of the State of Ohio erred in holding that the provisions of Section 21-1 of the act of the General Assembly of the State of Ohio passed May 31, 1911 and approved by the Governor June 15th, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards", (102 Ohio Laws 524), and said act in its entirety, is not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the provisions of said section assume and seek to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Ohio the equal protection of the laws.

Said Section 21-1 of said act is as follows, to-wit:

"All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suf-

fered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes,
147 and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses;

The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

Fourth. The Supreme Court of the State of Ohio erred in holding that the Court of Common Pleas of Franklin County, Ohio did not err at the trial of this cause in said Court of Common Pleas in charging the jury as follows:

"The answer of the defendant further contains, as alleged therein, the first defense and second defense. The substance of the first defense is that the plaintiff knew the circumstances and conditions surrounding himself at the time of his injury, or should have known them by the exercise of reasonable and ordinary care and that the injury sustained by him was by reason of the risks of injury assumed by him at said time and place. The second defense is in substance a denial by defendant that it was guilty of any negligence or carelessness, and further alleges that if it was negligent in any of the respects alleged in the petition that the plaintiff himself was guilty of negligence which directly contributed to and was directly the proximate cause of his injury.

In respect to said first and second defenses so specified in the answer of the defendant, I charge you that under the law of the State of Ohio that was in force and operation at the time of the injuries herein complained of, it was provided that all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment who shall not pay into the State Insurance Fund the premium provided by this act shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents, or employes, and that in such action the defendant shall not avail himself or itself of the following common law defenses, to wit, the defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence. That by operation of said statute, the substance of which I have heretofore stated, the defense of the assumption of risk by the plaintiff and the defense of the fellow servant rule or the defense of contributory negligence cannot operate as a defense in this case."

Fifth. The Supreme Court of the State of Ohio erred in finding that said Court of Common Pleas did not err at the trial of this cause in said Court of Common Pleas in holding that Section 21-1 of the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the Governor June 15th, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards" (102 Ohio Laws

524), and said act in its entirety, are valid and constitutional enactments and as not being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States and that by virtue of the provisions of said section of said act said Court of Common Pleas did not err in refusing to give to the jury the third written request for instructions to the jury requested to be given by
148 the plaintiff in error before the arguments to the jury, which said request was as follows:

"Plaintiff by entering the employ of the defendant and engaging in the work which he was employed to perform, assumed the ordinary and usual risks of injury incident to such employment. He is presumed to have had knowledge of those circumstances and conditions which men of ordinary skill and prudence under the same or similar circumstances exercising ordinary care for their own safety, would have had. It was the duty of plaintiff to use his senses to the same extent that men of ordinary care and prudence would, under the same or similar circumstances, to discover existing dangers; and if plaintiff's injury was caused by any danger which was one of the ordinary risks incident to his employment and which was known to him, or which could have been known to him by the exercise of reasonable and ordinary care on his part, then plaintiff cannot recover, and your verdict should be for the defendant."

Sixth. The Supreme Court of the State of Ohio erred in finding that said Court of Common Pleas did not err at the trial of this cause in said Court of Common Pleas in holding that Section 21-1 of the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the Governor June 15th, 1911 entitled "An act to create a state insurance fund for the benefit of injured and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards", (102 Ohio Laws 524), is a valid and constitutional enactment and as not being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by virtue of the provisions of said section of said act of said Court of Common Pleas did not err in refusing to give to the jury the fourth written request for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury, which said request was as follows:

"Plaintiff upon entering the employment of the defendant assumed the ordinary risks of the business incident to his employment which, considering his age, intelligence and experience, he knew, or by the exercise of ordinary care could have known. Included in the risks assumed by him was the possibility of his receiving an injury through the negligence of a fellow servant engaged in the same general employment.

Fellow servants are those who are in the employ of the same master, engaged in the same common enterprise, and who are employed to perform duties and services tending to accomplish the same general purpose and having no authority, direction or control over any employe engaged in the same general employment.

If you find from the evidence that plaintiff's injury was caused by

the negligence of a fellow servant, then plaintiff cannot recover, and your verdict shall be for the defendant."

Seventh. The Supreme Court of the State of Ohio erred in finding that said Court of Common Pleas did not err at the trial of this cause in said Court of Common Pleas in holding that Section 21-1 of the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the Governor June 15th, 1911 entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the admin-
149 istration of such fund by a state liability board of awards", (102 Ohio Laws 524), is a valid and constitutional enactment and as not being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by virtue of the provisions of said section of said act said Court of Common Pleas did not err in refusing to give to the jury the seventh written request for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury which said request was as follows:—

"If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant."

Eighth. The Supreme Court of the State of Ohio erred in finding that the Court of Appeals of Franklin County, Ohio did not err in holding that said Court of Common Pleas did not err in the several particulars hereinbefore set forth.

H. B. ARNOLD &
W. WILSON CARLILE,
Attorneys for Plaintiff in Error.

150 [Endorsed:] No. 14564. In the Supreme Court of the State of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend, Defendant in Error. Assignment of errors on writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed May 7, 1914. Supreme Court of Ohio, Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

151 In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

The above entitled cause coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme

Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition and the record in said case, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case—

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is, hereby approved.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Columbus, Ohio May 7, 1914.

152 [Endorsed:] No. 14564. In the Supreme Court of the State of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend, Defendant in Error. Order allowing writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed May 7, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

153 In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said state in which decision could be had in the said suit between The Jeffrey Manufacturing Company and Harry O. Blagg, by Joseph M. Downing, his next friend, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of the said The Jeffrey Manufacturing Company as by its complaint appears, we being willing that error, if any hath

been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6 day of June, 1914, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States the 7 day of May in the year of our Lord, 1914.

[Seal United States District Court, Southern Dist., Ohio.]

B. E. DILLEY,
Clerk of the United States District Court for the Southern District of Ohio, Eastern Division.

Allowed by—
HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

154 [Endorsed:] No. 14564. In the Supreme Court of the State of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed May 7, 1914. Supreme Court of Ohio, Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

155 In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To Harry O. Blagg, by Joseph M. Downing, his next friend, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Ohio, wherein

The Jeffrey Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered herein against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated this 7 day of May, 1914.

Copy of the above citation received this 8 day of May 1914, at Columbus, Ohio, and the appearance of the defendant in error is hereby entered.

F. M. McSWEENEY,
WILSON AND RECTOR,
Attorneys for Harry O. Blagg, by Joseph H. Downing, His Next Friend.

156 [Endorsed:] No. 14564. In the Supreme Court of the State of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend, Defendant in Error. Citation to defendant in error on writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed May 11, 1914. Supreme Court of Ohio, Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

157 In the Supreme Court of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Stipulation as to Transcript of Record.

COLUMBUS, OHIO, May 8, 1914.

The undersigned counsel for the respective parties in this cause hereby stipulate that the Clerk of the Court shall make a transcript of, shall certify and transmit the entire record in this cause, together with all pleadings and papers filed in this court excepting the testimony of the following witnesses contained in the bill of exceptions to-wit: Doctors Fred Fletcher, H. J. Means, W. J. Means & J. W. Means and Rachael Kidwell and George W. Steinman.

H. B. ARNOLD &
W. WILSON CARLILE,
Attorneys for Plaintiff in Error.
F. M. McSWEENEY, AND
WILSON AND RECTOR,
Attorneys for Defendant in Error.

158 [Endorsed:] No. 14564. In the Supreme Court of Ohio. The Jeffrey Manufacturing Company, Plaintiff in Error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend, Defendant in Error. Stipulation as to Transcript of Record. Filed May 11, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Arnold & Game, Attorneys-at-Law, Columbus, O.

159 Copy.

In the Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

Know all men by these presents, that we, The Jeffrey Manufacturing Company, as principal, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto Harry O. Blagg, by Joseph M. Downing, his next friend, in the sum of twenty two thousand dollars, to be paid to the said obligee, his successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of May, A. D. 1914.

Whereas, the above plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[CORPORATE SEAL.] THE JEFFREY MANUFACTURING COMPANY,
By CHAS. W. MILLER, *Its Secretary.*
[CORPORATE SEAL.] UNITED STATES FIDELITY & GUARANTY CO.,
By FRANK TALLMADGE,
Attorney in Fact.

160 STATE OF OHIO,
Franklin County, ss:

On this 7th day of May, 1914, before me the subscriber, a notary public within and for the County and State aforesaid personally appeared The Jeffrey Manufacturing Company by Charles W. Miller, its Secretary and The United States Fidelity and Guaranty Company by Frank Tallmadge, its Attorney in Fact, who severally acknowledged the execution of the foregoing bond to be their free and voluntary act and deed and of The Jeffrey Manufacturing Company and The United States Fidelity and Guaranty Company, respectively.

[NOTARIAL SEAL.] EDWIN F. HOOVER,
Notary Public, Franklin County, Ohio.

On this 7th day of May, 1914, the above bond having been presented to me for approval, and having examined the same and finding it in conformity to law, and sufficient in all respects, I hereby approve the same.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

161 Supreme Court of Ohio, January Term, 1914.

Title of Case.

Action.

THE JEFFREY MANUFACTURING COMPANY
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend.

Error to the Court of Appeals of Franklin County.

Attorneys:

Arnold & Game, W. Wilson Carlisle, Columbus.
Wilson & Rector, F. M. McSweeney, Columbus.

Transcript of Docket Entries (*M. B.* 32, *p.* 380).

1914.
Mar. 31.—Petition in Error, Precipe for Summons, Court of Appeals Transcript, Original Papers and Bill of Exceptions filed.
" " —Summons for Deft. issued to the Sheriff of Franklin County returnable April 13, 1914, as per P. O. Receipt 50660.
Apr. 1.—Papers taken by F. B. Toothaker. 4/16/'14, Ret'd.
" 1-3.—Summons for deft. returned and filed, endorsed: "Sheriff's Return. State of Ohio, Franklin County, ss. Received this writ March 31st, A. D. 1914, at 9 o'clock

A. M. and pursuant to its command on April 1st, 1914, I served the same by personally handing a true and duly certified copy of this writ with all the endorsements thereon to Fred C. Rector, Attorney of Record for the within named defendant in error, Harry O. Blagg. Sheriff's Fees, $1.15. Charles L. Resch, Sheriff, by John Trautman, Deputy."

Apr. 13.—Motion by Deft. to affirm, or to dismiss, and notice filed.
" " —Printed Briefs supporting motion filed.
" 15.—Ten printed copies of brief opposing motion filed by pl't'ff.
" 21.—Printed Record filed. 4/23/'14, Proof of Service filed.
" 28.—Motion to affirm judgment of Court of Appeals sustained, judgment affirmed. J. 26, 439.
May 5.—Mandate Issued.
" " —Original papers sent to Clerk.
" 7.—Petition for Writ of Error, Assignment of Errors, Bond $22,000 signed by pl't'ff in error as principal and The U. S. F. & G. Co., as surety, and Order allowing Writ and approving bond, filed.
" " —Writ of Error filed.
" " —Order allowing Writ of Error and approving bond. J. 26, p. 469.
" 11.—Citation on Writ of Error, and Entry of Appearance by def't filed.
" " —Stipulation as to Transcript of Record filed.
" 15.—Two copies of Writ of Error deposited in files.
" " —Bond deposited in files.

Transcript of Journal Entries.

1914.

April 28.—This cause came on to be heard on the Motion of the Defendant in Error to affirm the judgment of the Court of Appeals in said cause, said motion being No. 8378 on the Motion Docket of this Court, and was argued by counsel. This Court finds that the act of The General Assembly of the State of Ohio passed May 31, 1911, and approved by the Governor June 15, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards," and particularly Section 21-1 of said act (102 Ohio Laws 524), are valid and are not in violation of or
162 repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It is, therefore, ordered and adjudged by this Court that the said Motion be, and the same is hereby, sustained, and it is ordered and adjudged that the judgment of the Court of Appeals be, and the same is hereby affirmed.

It is further ordered and adjudged that the defendant in error recover of the plaintiff in error his costs herein and in the Courts below.

Ordered, That a special mandate be sent to the Court of Common Pleas of Franklin County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry."

May 7.—The above entitled cause coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition and the record in said case, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case—

It is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is, hereby approved.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Columbus, O., May 7, 1914.

163 *Certificate of Lodgment.*

SUPREME COURT,
State of Ohio, ss:

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on May 7th, 1914, in the case of The Jeffrey Manufacturing Company, plaintiff in error, against Harry O. Blagg, by Joseph M. Downing, his next friend, defendant in error—

1. The original bond, a copy of which is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 27th day of May, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

164 Supreme Court of the State of Ohio.

No. 14564.

THE JEFFREY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
HARRY O. BLAGG, by JOSEPH M. DOWNING, His Next Friend, Defendant in Error.

Authentication of Record.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation to defendant in error and his entry of appeaance, and stipulation as to transcript of record are the original papers filed in this Court in the above entitled cause; that the copy of the bond is a true copy of the bond filed in said cause; that the printed copy of the record attached hereto is a true copy of the printed record filed in said cause, the parts erased therefrom on pages 25, 26, 27, 28, 29, 30, 31, 72, 73, 74, 75, 76, 77, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 136, 137, 138 and 139, being so erased in accordance with the stipulation as to transcript of record; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court; and that no opinion was rendered by the Court in said cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 27th day of May, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 24,252. Ohio Supreme Court. Term No. 511. The Jeffrey Manufacturing Company, plaintiff in error, vs. Harry O. Blagg, by Joseph M. Downing, his next friend. Filed June 4th, 1914. File No. 24,252.

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IN THE

Supreme Court of the United States

No. 1101.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

Motion by Defendant in Error to Affirm the Judgment or to Dismiss the Writ of Error, or to Advance the Case for Trial.

Now comes the defendant in error and respectfully moves the court:

1. To affirm the judgment; or

2. To dismiss the writ of error herein; and (if said motions are overruled);

3. To advance this cause for trial.

Said motion to advance is upon the ground that the judgment herein is one for damages as the result of personal injury suffered by Harry O. Blagg, while in the employ of The Jeffrey Manufacturing Company, on or about June 9, 1912. Solely as a result of said injury then received, and since said date, said Blagg has been wholly

and totally disabled from performing any and every kind of work or labor, and on account of his helpless condition, he will continue to be unable to work or earn his own livelihood, and he has no expectancy or means of maintenance, except that represented by the said judgment. The parents of the said Blagg are dead, and he is in destitute circumstances, and dependent entirely on the charity of his friends and upon the public for the common necessities of life. (See affidavit printed on page 68 herein, the original of which is on file in the clerk's office in this court.)

Wilson & Rector,
Fred M. McSweeney and
Fred C. Rector,
Attorneys for Defendant in Error.

STATEMENT.

Notice of the above motion has been served upon the plaintiff in error herein, together with a copy of the motion and of the brief in support thereof, as more fully appears by the original documents on file in the clerk's office. The defendant in error has also printed and filed herewith in the appendix to this brief, such portion of the record herein as is deemed necessary for the consideration of the motion.

This writ of error is sued out by the plaintiff in error to reverse a judgment of the Supreme Court of Ohio affirming a judgment of the Court of Appeals, in and for Franklin county, Ohio, which last mentioned court affirmed the judgment of the Court of Common Pleas for said county and state.

The sole question presented here is concerning the constitutionality of the Workmen's Compensation Act,

passed by the General Assembly of Ohio, May 31, 1911, and approved by the governor June 15, 1911 (102 Ohio Laws, 524). Said act will be found printed in full in the appendix (page ——).

The original action is one filed by Blagg to recover damages for personal injuries, suffered as a result of the negligence of The Jeffrey Manufacturing Company while Blagg was employed by said company.

A verdict was returned in favor of Blagg for twenty-five thousand ($25,000.00) dollars, and the same was reduced by the Common Pleas Court to sixteen thousand ($16,000.00) dollars, and judgment entered for said sum in favor of Blagg. All the courts of Ohio affirmed said judgment. When the case reached the Supreme Court of Ohio, a motion was made to affirm the judgment of the Court of Appeals, which affirmed the judgment of the Common Pleas Court, on the ground that no error was presented upon the record, and said motion was sustained.

The Jeffrey Manufacturing Company filed an answer containing among other things two defenses, which are as follows:

> "Defendant for its first defense herein says that all the circumstances and conditions surrounding plaintiff at the time of his said injury were all well known to him or by the exercise of reasonable and ordinary care would have been known to him and were incident to his employment, and the risks of injury therefrom or thereby were assumed by him.
>
> Defendant for its second defense herein denies that it was guilty of any negligence or carelessness and says that if it were negligent in any of the respects alleged in said petition the plaintiff himself was guilty of negligence which directly contributed to and was the direct and proximate cause of his said injury, in that he knew or by the exercise of reasonable and ordinary care ought to have known

the danger of crossing the switch between said cars, and that with said knowledge or that knowledge which by the exercise of due care he would have had the said plaintiff negligently and carelessly crossed said track between said cars and was injured as the result of his own carelessness and failure to use due care in the premises."

These defenses are what are commonly known as assumed risk and contributory negligence, according to the claims of counsel for The Jeffrey Manufacturing Company.

The Jeffrey Manufacturing Company did not avail itself of the provisions of the said compensation act, which was in force at the time Blagg suffered his terrible injuries; therefore it could not avail itself of the defenses commonly known as "assumption of risk" and "contributory negligence."

By a special request to charge, which the court refused to give, The Jeffrey Manufacturing Company tried to inject into the case the question of negligence of fellow servant. No such claim, however, is made in the answer.

At the trial, The Jeffrey Manufacturing Company requested the court to charge the jury before argument as follows:

"Defendant's Request No. 3:

Plaintiff by entering the employ of the defendant and engaging in the work which he was employed to perform, assumed the ordinary and usual risks of injury incident to such employment. He is presumed to have had knowledge of those circumstances and conditions which men of ordinary skill and prudence, under the same or similar circumstances exercising ordinary care for their own safety, would never had. It was the duty of plaintiff to use his senses to the same extent that men of ordinary

care and prudence would, under the same or similar circumstances, to discover existing dangers; and if plaintiff's injury was caused by any danger which was one of the ordinary risks incident to his employment and which was known to him, or which could have been known to him by the exercise of reasonable and ordinary care on his part, then plaintiff cannot recover, and your verdict should be for the defendant."

"Defendant's Request No. 4:

Plaintiff upon entering the employment of the defendant assumed the ordinary risks of the business incident to his employment which, considering his age, intelligence and experience, he knew, or by the exercise of ordinary care could have known. Included in the risks assumed by him was the possibility of his receiving an injury through the negligence of a fellow servant engaged in the same general employment.

Fellow servants are those who are in the employ of the same master, engaged in the same common enterprise, and who are employed to perform duties and services tending to accomplish the same general purpose and having no authority, direction or control over any employe engaged in the same general employment.

If you find from the evidence that plaintiff's injury was caused by the negligence of a fellow servant, the plaintiff cannot recover, and your verdict should be for the defendant."

"Defendant's Request No. 7:

If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant."

The plaintiff in error attempted to make its constitutional question in this case for the first time in the motion for a new trial, and by the following allegation:

"Seventh. Error of the court in charging the jury that under the provisions of the Ohio Workmen's Compensation Law, being the act of the General Assembly of the State of Ohio approved June 15, 1911 (102 O. L., 524), to the effect that the defendant could not avail itself of the first and second defenses set forth in its answer herein, and that the same could not operate as a defense herein, for the reasons that said act is invalid and void, and the provisions thereof removing the defenses of the assumption of risk, fellow servant rule and contributory negligence are void, as violating the provisions of the Constitution of the State of Ohio and the several and respective amendments thereof and thereto, and the provisions of the Constitution of the United States and of the several and respective amendments thereof and thereto."

No other allegation touching this matter or raising this question appears in the proceedings in the Court of Common Pleas, that being the court of original jurisdiction in this case.

By a petition in error filed in the Court of Appeals, the plaintiff in error, as its fourth allegation of error, used exactly the same language as appeared in its motion for a new trial, as above set forth.

No other or different attempt to raise the constitutional question was made in the Court of Appeals.

In the petition in error filed in the Supreme Court of Ohio, the following allegations are made:

> "First. Said Court of Appeals erred in finding that the Court of Common Pleas of Franklin county, Ohio, did not err at the trial of this cause in said

Court of Common Pleas in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury, to which the plaintiff in error at the time excepted.

Second. Said Court of Appeals erred in finding that said Court of Common Pleas did not err at the trial of this cause in charging the jury that the provisions of the so-called Ohio Workmen's Compensation Law (being the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the governor June 15, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to," etc., 102 Ohio Laws, 524), was the law of the State of Ohio and was in force and operation at the time of the injuries complained of by the defendant in error, and that by virtue of the provisions of said pretended law all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment and who did not pay into the state insurance fund the premium provided by said pretended law should be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes, that plaintiff could not avail itself of the common law defenses of assumption of risk, fellow servant rule and contributory negligence rule, and that said defenses of assumption of risk, fellow servant rule, and contributory negligence could not operate as a defense for the plaintiff in error in this cause.

Third. Said Court of Appeals erred in finding that said Court of Common Pleas at the trial of this cause did not err in charging the jury that said act of the General Assembly of the State of Ohio, passed May 31, 1911, and approved by the governor June 15, 1911 (102 Ohio Laws, 524), was a valid law and was not in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by virtue of said pretended law the plaintiff in error could not avail it-

self of the first and second defenses set forth in its answer upon which this cause was tried in said Court of Common Pleas, to wit, the defenses of assumption of risk, fellow servant rule and contributory negligence."

The final entry of the judgment of the Supreme Court is as follows:

"This cause came on to be heard on the motion of the defendant in error **to affirm the judgment of the Court of Appeals**, in said cause, said motion being No. 8378, on the motion docket of this court, and was argued by counsel. The court finds that the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the governor June 15, 1911, entitled, "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such funds by a state liability board of awards," and particularly Section 21-1 of said act (102 Ohio Laws, 524), are valid and are not in violation of or repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It is therefore ordered and adjudged by this court, that the said motion be, and the same is hereby **sustained, and** it is ordered and adjudged that the **judgment** of the Court of Appeals be, and the same hereby is, **affirmed.** It is further ordered and adjudged that the defendant in error recover of the plaintiff in error his costs herein and in the courts below.

Ordered, that a special mandate be sent to the Court of Common Pleas to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Franklin county, "for entry."

THE ARGUMENT.

The attorney general of Ohio on behalf of the state has prepared a brief and argument upon the constitutionality of the said legislative enactment, which is printed and submitted herewith.

It is the position of the defendant in error that the constitutional question has not been properly or with sufficient definiteness made upon the record of this case; but even if we are mistaken in this, there is no error apparent upon the record, all of the constitutional questions made, or attempted to be made, having been repeatedly settled and adjudged against the plaintiff in error by this court.

For these reasons, we submit the judgment should be affirmed upon motion, or the writ of error dismissed.

But if these motions should be denied, then for the reasons set up in the affidavit of the defendant in error (see appendix, page ——), we respectfully submit the case should be advanced for an early trial.

The determination of the motion to affirm or dismiss does not rest on any question of fact; but in any event there can be and is not any dispute as to questions of fact, so far as said motion is concerned.

In discussing the constitutional question it is extremely difficult in the first instance to anticipate the objections which may be made to the law, and consequently, the law being presumed constitutional, it would be more proper to present argument sustaining the law after the attack thereon had been made in a definite way. Because of this we shall but briefly state our reasons and cite authorities which we think are directly in point

in favor of the validity of the statute in question, at the same time respectfully suggesting to the court that, if necessary, we shall, in our reply brief, more fully and at greater length discuss the objections which may hereafter be made by counsel for plaintiff in error.

All questions arising under the state constitution have been foreclosed by the decision of the Supreme Court of Ohio in the case of

State ex rel. Yaple v. Creamer, 85 O. S., 349.

The argument there presented is also applicable to the federal questions involved in so far as the federal constitution and the state constitution contain similar provisions. It is interesting to note that laws of this character have been uniformly upheld against all possible objections.

State ex rel. Davis-Smith Co. v. Clauson, 65 Wash., 156.
Borgniss v. Falk Co., 147 Wis., 327.
Sexton v. Newark District Tel. Co., 86 Atl., 451 (N. J.)
Opinions of Justices, 209 Mass., 607.
State v. Mountain Timber Co., 135 Pac., 647.
Stettler v. O'Hara, 139 Pac., 543.

While in the case of Cunningham v. Improvement Co., 119 Pac., 554, the Supreme Court of Montana declared a somewhat similar law unconstitutional, it was not so decided upon any ground that can be here advanced against the law, and all of the contentions of this case were decided favorably to the Montana law in the decision just referred to.

We think that there can be no question that the decision of the Supreme Court of Ohio was absolutely correct in holding that a law of this character was within the police power of the state. This power is of very wid-

ening force. It is progressive in character and must be construed so as to meet the modern conditions of society. This becomes very plain when we consider that it is vested in the legislature in order to enable it to establish laws which are for the good and welfare of the commonwealth of its people.

Railway Co. v. Moore, 16 Kas., 573.
Commonwealth v. Alger, 7 Cushing, 85.

This has been very well expressed by Mr. Justice Harlan in C. B. & Q. Ry. Co. v. Ill., 200 U. S., 341:

> "We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

Crowley v. Christianson, 137 U. S., 86.
Munn v. Illinois, 94 U. S., 113.
Barbier v. Connolly, 113 U. S., 31.
In re Kemmler, 136 U. S., 436.
Canfield v. United States, 167 U. S., 518.
McGehee on "Due Process of Law," p. 301.

In Holden v. Hardy, 169 U. S., 366, 387, this court, after referring to changes made in the common law, says that

> "They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a great extent flexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power so to amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

> "Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day the Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue and the law be forced to adapt itself to new conditions of society and particularly to the new relations between employer and employe as they arise."

The same decision recognized the fact that the law is a progressive science, and after referring to that case, Mr. Justice Holmes in Lochner v. N. Y., 198 U. S., 45, 76 (dissenting opinion), says:

> "Liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of dominant opinion."

Note also the language of Mr. Justice Matthews in Hurtado v. California, 110 U. S., 530, in regard to the flexibility and capacity for growth of the common law.

Mr. McGehee in his admirable work on "Due Process of Law" very aptly says, in speaking of the pertinency of social, economic, and industrial conditions with reference to considerations of public welfare:

> "The repeated development of modern industries bringing into play new forms of power from wealth and combination, and the increasing complexity of civilization, have already rendered necessary restrictive legislation which would have seemed intolerable to the generation nurtured in the legislative theories of Bentham. Enlightened public opinion, as reflected by our legislatures, and the courts, has receded from the doctrine of **laissez-faire**, and we cannot say that a further abandonment of that position may not be more advisable. It is of utmost importance, then, not to give to the broad and simple phrases employed in the constitution in the enumeration of fundamental rights, so rigid an interpreta-

tion as will hamper the legislature in fashioning remedies for apparent evils and abuses."

McGehee on "Due Process of Law," page 362.

Note the language of Mr. Justice Holmes in Noble State Bank v. Haskell, 219 U. S., 104:

> "It may be said in a general way that the police power extends to all great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong or preponderant opinion to be greatly and immediately necessary to the public welfare."

In the immediately foregoing case it was held that the state had a right to levy an assessment upon all banks within the state to create a fund to pay the liabilities of insolvent banks. Now if it is in the interest of the public welfare to permit this to be done, does it not necessarily follow that provision for compensation to those who have been injured and the dependents of such that have been killed in the course of their employment may properly be made? The policy of such legislation has been given recognition which may be regarded as world wide. This court has fully recognized the evils which a law of this character is designed to prevent in the case of Johnson v. Southern Pacific Ry. Co., 196 U. S., 1, wherein it quotes the following language of President Harrison:

> "It is a reproach to our civilization that any class of American workmen who, in the pursuit of a necessary and useful vocation, be subject to a peril of life or limb as great as that of any soldier in time of war."

Note the language used in the act passed by the legislature of the State of Washington.

The language of Mr. Chief Justice Winslow and Judge Marshall in Borgnis v. Falk Co.

The reports of hearings before the Employers' Liability and Workmen's Compensation Commission of the Federal Government.

As before stated the Supreme Court of Ohio has decided that this statute did not infringe the due process of law provision of the Constitution. The same holding may be found in each of the foregoing cases cited by us as sustaining workmen's compensation acts.

Professor Freund in his work on "Police Power" says:

> "The guarantee that no person shall be deprived of life, liberty or property without due process of law, may be traced to the Great Charter, and was originally intended as a safeguard against the arbitrary and despotic exercise of executive power, and not against legislation. The same meaning was probably attached to it by the framers of our first Constitutions. Not that arbitrary acts depriving an individual of life, liberty or property had never taken the form of statutes; parliament, on the contrary, had frequently been made the instrument of despotism, but those abuses were guarded against by special constitutional provisions.
>
> "The prohibition of acts of attainder, the provisions that provide property must not be taken for public use without compensation and that the obligation of contracts must not be impaired. An act of legislation taking life, liberty or property, and not covered by either of those clauses was probably not thought of when the first constitutions were framed.
>
> "At the present time, however, the idea of due process is frequently applied to legislation and means with regard to it 'conformity to the settled maxims of free government.'"
>
> Freund "Police Power," Section 20.

This court has never hesitated to declare that limitations of this character in the federal constitution were

not designed to interfere with the exercise of the state police power.

Barbier v. Connolly, 113 U. S., 31.
Jones v. Brim, 165 U. S., 180.
Cunnius v. School District, 198 U. S., 469.

Consequently the test whether due process of law has been violated is that of reasonableness as distinguished from arbitrary action, but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of legislation, or as has been said by this court, "judges should be slow to read into the latter a **nolumus mutare** as against a law-making power."

Bank v. Haskell, 219 U. S., 204.

Mr. Justice Matthews on page 582 of Hurtado v. California, 110 U. S., 530, says:

> "That process of law which is not otherwise forbidden must be taken as due process of law, if it can show the sanction of settled usage both in England and in this country, but it by no means follows that nothing else can be due process of law. But to hold such a characteristic as essential would be to deny every quality of law but its age, and to render it incapable of progress or improvement. It would be to stamp on our jurisprudence the unchangeableness attributed to the law of the Medes and Persians. Where the public interest or the safety and welfare of the state require the curtailment of the liberty of contract, the latter may be restrained."

Patterson v. Eudora, 190 U. S., 169.
Frisbie v. U. S., 157 U. S., 160.
Ornstine v. Carey, 204 U. S., 669.
Twining v. New Jersey, 211 U. S., 78, 101.
Mueller v. Oregon, 208 U. S., 412.
Oceanic, etc., Co. v. Stranahan, 214 U. S., 320.
Iron Co. v. Harbison, 183 U. S., 13.
Atkins v. Kansas, 191 U. S., 207.
Coast Line R. R. Co. v. Riverside Mills, 219 U. S., 186.
U. S. v. D. & H. R. R. Co., 213 U. S., 407.

The reasonableness of legislation is a matter for the consideration of the law-making branch of government, and unless discretion has been abused the law will stand.

McGehee on Due Process of Law, pages 306-8.
Grundling v. Chicago, 107 U. S., 185.
McClain v. Arkansas, 211 U. S., 547.

Professor Freund in Section 63 of his work on "Police Power" says:

> "The courts are certainly emphatic in their assertion that they have nothing to do with the wisdom or expediency of legislative measures. * * * The question of reasonableness usually resolves itself into this: Is regulation carried to a point where it becomes prohibition, destruction or confiscation?"

The law here under discussion has an end which is beneficial to the state and promotive of the public welfare. It does not arbitrarily or unduly oppress any person, and hence is within the legislative power. Its object is to substitute for an inadequate, insufficient system, a newer and better theory, placing upon the industries of the state the burden of caring for those who are injured in the course of their employment. It keeps the injured and the dependents of the killed employe from becoming a burden on society.

It has been argued that because of the classification between employers of five or more workmen and those hiring less than that number, the act denies equal protection of the laws. We are given to understand that opposing counsel primarily rely upon this point. The fallacy of this has been explained in numerous decisions. It must be remembered that discrimination is not invalid if it is not so arbitrary as to be beyond the wide discretion that a legislature may exercise. It may rest on narrow distinction. Whether it makes for public wel-

fare is a matter of legislative judgment, and the courts cannot set aside a law except upon the ground of want of power.

> German-Alliance Insurance Co. v. Lewis, 233 U. S., 389.

It has often been held that the federal supreme court is not a place of refuge from oppressive and unequal legislation, as the hardship, impolicy or injustice of state laws is not necessarily a constitutional objection. With the folly or wisdom of a law the Fourteenth Amendment has no concern.

> Billings v. Illinois, 188 U. S., 97, 102.
> Clark v. Kansas City, 176 U. S., 114.
> Mobile County v. Kimball, 102 U. S., 691.

The constitutional mandate permits classification and the state may select, distinguish and classify the objects of legislation.

> Kentucky R. R. Tax Cases, 115 U. S., 321.
> Bachtel v. Wilson, 204 U. S., 42.
> Falter v. Nebraska, 205 U. S., 34.
> Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283.
> Atcheson R. R. v. Matthews, 174 U. S., 96, 106.
> Kansas City So. Ry. Co. v. Anderson, 233 U. S., 325.
> Mo. K. & T. Ry. v. Harris, 234 U. S., 412.
> Mo. K. & T. Ry. v. Cado, 233 U. S., 642.
> R. R. v. Massachusetts, 174 U. S., 96.
> Ry. v. Mackey, 127 U. S., 205.

The whole question has been very fully discussed in Mondau v. N. Y., etc., Ry. Co., 223 U. S., 1. It is there said:

> "Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by the railroad, although there are other interstate carriers, and is im-

posed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those which other employes in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the due process clause of the fifth amendment even if it be assumed that that clause is equivalent to the equal protection laws clause of the Fourteenth Amendment, which is the most that can be claimed for it. Here it does not ask from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

Lindley v. North Carolina Gas Co., 220 U. S., 61, 78.

"Tested by these standards this classification is not objectionable. Like classification of railroad carriers and employes for like purposes when assailed under the equal protection clause, have been sustained by repeated decisions of this court."

The exact point has been determined by this court in McClain v. Arkansas, 211 U. S., 539. A coal screen law was there under consideration. It was contended that the exemption of coal mines not employing ten or more men rendered the statute invalid as denying the equal protection of the laws. The court held that this was not an attempt at unreasonable or unjust designation, the law being alike applicable to all mines employing more than ten men under ground.

"It may presumed," says Mr. Justice Day, "to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions

mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us in the exercise of the right of judicial review to reverse the judgment of the Supreme Court of Arkansas which has affirmed its validity."

Reliance is had upon the case of Coal Co. v. Illinois, 135 U. S., 203, which is held to be decisive. The law there was limited in its operation in mines where more than five men were employed at any one time.

Note the language of the court on page 207 in disposing of this contention:

> "There is a clear and reasonable distinction on which to base classification for taxation between telegraph and telephone corporations conducting for profit large businesses and having offices and exchanges in cities and villages, and those conducting a very small business for mutual convenience of the incorporators."

Telephone Co. v. Fuller, 229 U. S., 322.
New York, etc., Co. v. New York, 165 U. S., 628.
Magoon v. Trust Co., **supra.**
Barrett v. Indiana, 229 U. S., 26.
Onongwing v. Kirkendall, 223 U. S., 59.
Chicago, etc., Co. v. McGuire, 219 U. S., 549.
(See this case also on point of liberty of contract.)
Engel v. O'Malley, 219 U. S., 128.

The merit of a classification of this character has been recognized by the Supreme Court of Wisconsin in Borgnis v. Falk Co., **supra**, upon the theory that the man who is employed with one or two other men in a given employment knows their characteristics and will have ample opportunity to form a just judgment as to the risk of injury from their negligence; whereas he who is one of a large number, many of whom he never sees, and

some of whom have duties in distant places, upon the due performance of which his own safety depends, has no opportunity of acquiring accurate knowledge of their characteristics. He cannot intelligently decide what risk he runs. This difference of situation is not fanciful but real. The court also recognized the fact that there will be cases on the border line, there being no practical difference between the situation of the man who is one of four or five, but this is a necessary defect in all cases of classification based on numbers.

> "The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a distinction between the classes as classes, whether there are characteristics which in a greater degree persist in the one class than in the other, which justify legal discrimination between them. We regard it as unnecessary to say more upon this point."

It may be urged that the law is violative of the Seventh Amendment of the United States Constitution with reference to trial by jury. This is a matter which is to be left to the state, as that provision of the Constitution relates only to trials in the federal courts.

> Walker v. Sauvinot, 92 U. S., 90.
> Edward v. Elliott, 21 Wallace, 557.
> Bemis v. Drainage District, 105 N. E., 496.

This act having been passed by virtue of the police power of the state, being in conformity with and occasioned by public opinion, and being neither a denial of the equal protection of the laws, an unwarranted restriction of due process of law, nor in any way violative of the federal constitution, we respectfully submit that

the judgment of the Supreme Court of Ohio, twice expressed upon this law should be held.

Respectfully submitted,

Timothy S. Hogan,
Attorney General.

James I. Boulger,
F. M. McSweeney,
Wilson & Rector,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF OHIO

No. 14564.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

Petition in Error.

[Filed March 31, 1914.]

Plaintiff in error says that at the January Term, to wit, on the twenty-eighth day of March, 1914, of the Court of Appeals of Franklin county, Ohio, the defendant in error, Harry O. Blagg, by Joseph M. Downing, his next friend, recovered a judgment upon the consideration of said court against the plaintiff in error, The Jeffrey Manufacturing Company, in cause number 139 pending in said court, wherein plaintiff in error was plaintiff in error and defendant in error was defendant in error, a transcript of the docket and journal entries whereof, together with all the original papers and bill of exceptions embodying all the evidence are filed herewith.

There is error in said record and proceedings in this, to wit:

First. Said Court of Appeals erred in finding that the Court of Common Pleas of Franklin county, Ohio,

did not err at the trial of this cause in said Court of Common Pleas in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the plaintiff in error before the arguments to the jury, to which the plaintiff in error at the time excepted.

Second. Said Court of Appeals erred in finding that said Court of Common Pleas did not err at the trial of this cause in charging the jury that the provisions of the so-called Ohio Workmen's Compensation Law (being the act of the General Assembly of the State of Ohio passed May 31, 1911, and approved by the governor June 15, 1911, entitled "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to," etc., 102 Ohio Laws, 524), was the law of the State of Ohio and was in force and operation at the time of the injuries complained of by the defendant in error, and that by virtue of the provisions of said pretended law all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment and who did not pay into the state insurance fund the premium provided by said pretended law should be liable to their employes for damages suffered by reason of personal injuries sustained in the course of the employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes, that plaintiff in error could not avail itself of the common law defenses of assumption of risk, fellow servant rule and contributory negligence rule, and that said defenses of assumption of risk, fellow servant rule and contributory negligence could not operate as defenses for the plaintiff in error in this cause.

Third. Said Court of Appeals erred in finding that said Court of Common Pleas at the trial of this cause did not err in charging the jury that said act of the General Assembly of the State of Ohio, passed May 31, 1911, and approved by the governor June 15, 1911, (102 Ohio Laws, 524) was a valid law and was not in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by virtue of said pretended law the plaintiff in error would not avail itself of the first and second defenses set forth in its answer upon which this cause was tried in said Court of Common Pleas, to wit, the defenses of assumption of risk, fellow servant rule and contributory negligence.

Fourth. Said Court of Appeals erred in finding that said Court of Common Pleas did not err in the trial of said cause in the respects hereinbefore set forth, and in affirming the judgment of said Court of Common Pleas and remanding this cause to said Court of Common Pleas for execution.

Plaintiff in error therefore prays that said judgments of said Court of Appeals and said Court of Common Pleas may be reversed and set aside; that this cause be remanded to said Court of Common Pleas for further proceedings, and that it be restored to all things which it has lost by reason thereof.

Arnold & Game and
W. Wilson Carlisle,
Attorneys for Plaintiff in Error.

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant.

[No. 139.]

Transcript of Docket and Journal Entries.

1914, January 14. Petition in error filed.

1914, January 14. Precipe filed; summons issued to sheriff Franklin county, Ohio; returnable January 26, 1914.

1914, January 14. Transcript docket and journal entries filed.

1914, January 14. Thirty-five original papers filed.

1914, January 26. Bill of exceptions filed.

1914, January 31. Three briefs and receipt on behalf of plaintiff in error filed.

1914, February 16. Three briefs and receipt for defendant in error filed.

1914, February 16. Motion to advance filed.

1914, February 16. Affidavit in support of motion to advance filed.

1914, March 28. Judgment affirmed as per entry. 1-139.

1914, March 28. Mandate issued. 3-234.

Journal Entry.

March 28, 1914. The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said The Jeffrey Manufacturing Company, plaintiff in error herein, together with the bill of exceptions, original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Franklin county, Ohio, filed therewith in the said court, wherein Harry O. Blagg, by Joseph M. Downing, his next friend, was plaintiff, and The Jeffrey Manufacturing Company was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record or said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said Court of Common Pleas in said case in favor of the said defendant in error, and against the said plaintiff in error, be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $———, and in default thereof that execution issue therefor.

Ordered, that a special mandate be sent to the Court of Common Pleas of Franklin county, to carry this judgment into execution.

To all of said ruling, order and judgment plaintiff in error excepts.

[Duly certified.]

Petition in Error.

[Filed January 14, 1914.]

The plaintiff in error states that at the September Term, 1913, to wit, on the twenty-ninth day of December, 1913, of the Court of Common Pleas of Franklin county, Ohio, in case No. 65292 pending in said court the defendant in error, Harry O. Blagg, by Joseph M. Downing, his next friend, recovered a judgment upon consideration of said court against the plaintiff in error, The Jeffrey Manufacturing Company, in an action then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of the docket and journal entries whereof, together with the original papers and bill of exceptions embodying all the evidence, are filed herein.

There is error in said record and proceedings in this, to wit:

First. Said court erred in overruling the motion of plaintiff in error for a new trial.

Second. Said court erred in refusing to give separately to the jury the several and respective written instructions requested by the plaintiff in error to be given to the jury before the arguments of counsel on the trial of said cause.

Third. Said court erred in its charge to the jury on the trial of said cause.

Fourth. Said court erred in charging the jury that under the provisions of the Ohio Workmen's Compensation Law, being the act of the General Assembly of the State of Ohio approved June 15, 1911 (102 Ohio Laws, 524), to the effect that the plaintiff in error could not avail itself of the first and second defenses set forth in its answer herein, and that the same could not operate

as defenses herein, for the reason that said act is invalid and void, and the provisions thereof removing the defenses of the assumption of risk, fellow servant rule and contributory negligence are void, as violating the provisions of the Constitution of the State of Ohio and the several and respective amendments thereof and thereto, and the provisions of the Constitution of the United States and of the several and respective amendments thereof and thereto.

Fifth. Said court erred in other particulars manifest on the face of the record to the prejudice of the plaintiff in error.

Plaintiff in error therefore prays that said judgment of said Court of Common Pleas may be reversed and that it be restored to all rights which it has lost by reason thereof.

W. Wilson Carlisle and
Arnold & Game,
Attorneys for Plaintiff in Error.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,

Plaintiff,

vs.

THE JEFFREY MANUFACTURING COMPANY,

Defendant.

[No. 65292.]

Transcript of Docket and Journal Entries.

1913, May 6. Petition, affidavit and precipe filed; summons issued to sheriff Franklin county, Ohio; returnable May 19; answer June 7, 1913.

1913, June 7. Answer filed.

1913, November 5. Plaintiff permitted to amend petition as entry. 173-142.

1913, November 24. Motion of defendant filed.

1913, November 24. Affidavit of W. A. Givens filed.

1913, November 24. Diltz appointed official stenographer. 167-414.

1913, November 24. Jury impaneled and sworn. 167-414.

1913, November 24. Reply filed.

1913, November 25. Eight (8) requests for defendant filed.

1913, November 25. Trial concluded; verdict for plaintiff for $25,000. 167-415.

1913, November 26. Stenographer's certificate filed, $8.

1913, November 28. Motion for new trial filed.

1913, December 1. Affidavit of Geo. Steinman filed.

1913, December 29. Motion for new trial overruled; judgment for plaintiff for $16,000; exceptions. 167-454.

1913, December 31. Precipe filed; Fi Fa. issued sheriff Franklin county, Ohio. 31-19982.

Journal Entries.

November 5, 1913. It is ordered that the plaintiff be permitted to amend the petition at bar by inserting after the word "plaintiff," in the eighth line, on the second page thereof, the words "then employed by defendant;" and after the word "directed," in the ninth line, on said page, the words, "by defendant;" and after the word "instructed," in the twelfth line, of said page, the words, "by defendant;" and after the word "destroyed," in the fifth line, on the third page, the words "and subsequently removed." Leave given defendant to file answer to petition as amended on or before November 10, 1913.

November 24, 1913. This day upon application of plaintiff and defendant it is ordered by the court that H. B. Diltz, official stenographer, is appointed to take the testimony in this case.

November 24, 1913. This day came the parties by their counsel and the following named persons who were duly impaneled and sworn as jurors in this case according to law, to wit: Ellis Jones, John Borst, Thomas Jerman, Robert Roes, Louis Strasser, Christopher Davis, Mont Smith, James Baker, Carl Sowming, John DeLong, Williard Brink, Earl Little; trial progressed.

November 25, 1913. This day again came the parties by their counsel and the jury heretofore being duly impaneled and sworn, according to law; trial progressed, and after the jury had listened to the testimony, the

arguments of counsel, and the charge of the court they retired to their room in charge of the court constable and afterwards came into open court with their verdict in writing, to wit: We the jury being duly impaneled and sworn find the issues in this case in favor of the plaintiff and assess the amount due to the plaintiff from the defendant at the sum of $25,000, twenty-five thousand dollars.

Thomas Jerman, Foreman.

December 29, 1913. This cause came on to be heard on the motion to set aside the verdict and for a new trial, and the court being of opinion that the damages assessed by the jury are excessive to the amount of nine thousand ($9,000) dollars, and the plaintiff here in court now consenting to remit the excess aforesaid, thereupon the said sum of nine thousand ($9,000) dollars being remitted and deducted from the said verdict, the court overruled the motion for a new trial; to which ruling the defendant excepts.

It is therefore considered, ordered and adjudged by the court that the plaintiff recover from the defendant, the sum of sixteen thousand ($16,000) dollars, the residue of the damages by the jury assessed, together with his costs herein expended, taxed at $———; to which ruling, order and judgment, the defendant excepts.

[Duly certified.]

THE COMMON PLEAS COURT.

Petition.

[Filed May 6, 1913.]

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,

Plaintiff,

vs.

THE JEFFREY MANUFACTURING COMPANY,

Defendant.

The plaintiff is nineteen years of age, and brings this action by Joseph Downing, his next friend. The defendant is a corporation organized under the laws of Ohio, and doing business in Columbus, Ohio.

On the ninth day of June, 1912 and long prior thereto, the defendant was engaged in the manufacturing business in Columbus, Ohio, and was employing many hundreds of men regularly in the same business and in and about the same establishment, and had not paid into the state insurance fund any premiums provided by the Act of the General Assembly of Ohio, known as "The Workmen's Compensation Law," which was then in force, and which was passed May 31, 1911, being G. C. Sections 1465-37 to 1465-81, inclusive.

In the conduct of its business the said defendant used many buildings and many acres of land. On the south side of the grounds or lands used in the business of the said defendant was a railroad track or switch used for the purpose of storing cars. To the knowledge of the defendant said switch would hold eight ordinary freight cars, and no more, when said cars were crowded closely

together. At the times hereinafter mentioned, and to the knowledge of the defendant, there were seven freight cars, standing upon said switch and between the fourth and fifth cars was an opening of about three feet, left for the use of employes of the defendant that might have occasion to pass between the ends of said cars, when engaged in the performance of their duties. Between said switch and the fence on the extreme south side of said lands, and at the times hereinafter mentioned, were two piles of lumber. The plaintiff then employed by defendant herein had been directed by defendant to assist in removing said lumber to a point on the north side of said switch. In so doing, it was necessary, as the defendant well knew, and as the plaintiff had been directed and instructed by defendant to do, for the plaintiff to pass through said opening between said fourth and fifth cars on said switch. While plaintiff, following said instructions, was engaged in said labor, and as he was between said cars, the defendant caused to run against the car standing on the east end of said switch, a long cut of cars pushed by an engine, the property of the defendant, with the result that the cars on said switch were jammed and pushed together, and plaintiff was caught about the hips between said fourth and fifth cars.

The defendant negligently and carelessly had in charge of said cut of cars, the exact number of cars being to the plaintiff unknown, but a single man, whose duty it was to control the movement of said cars, give the necessary signals to the engineer running said locomotive, make the necessary couplings or uncouplings between said cars, watch the tracks on which said cars were moving, and give warning to those who might be

in danger of injury, and do any and all other things incident to the control or movement of said cut of cars.

At said time the plaintiff had no knowledge that said cut of cars was about to be pushed into said switch or against said east car, and there was no signal or warning of any kind given to the plaintiff of the intention of the defendant so to do.

As the result of the injury then and there received, the joint of the plaintiff's right hip and leg was mashed, crushed, and permanently injured, to such an extent that the same was destroyed, and subsequently removed and the joint and bones of the left hip and leg were so mashed and injured as to render the plaintiff unable to use said leg.

The plaintiff because of said injury was made to suffer great pain of body and distress of mind, and said suffering since said date has been continuous and will be permanent. The plaintiff will throughout the rest of his life be and remain permanently a cripple, unable to walk, or to engage in his usual or ordinary avocation of a laboring man. Prior to said date, the plaintiff was a strong, able bodied, vigorous man, and was earning about two ($2) dollars per day.

The said injury to plaintiff resulted solely from the negligence of the defendant in the following respects, to wit:

1. In causing said cut of cars to be pushed upon and against the cars standing upon said switch while plaintiff was between said cars.

2. In failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or against the car on the east end thereof.

3. In having an insufficient number of men or employes engaged in the handling and switching of said cut of cars.

Wherefore plaintiff prays damage against the defendant in the sum of thirty-five thousand ($35,000) dollars.

Fred M. McSweeney,
Wilson & Rector,
Attorneys for Plaintiff.

[Duly verified.]

Answer.

[Filed June 7, 1913.]

Now comes the defendant and for its answer to the petition herein admits that plaintiff is nineteen years of age and brings this action by Joseph M. Downing, his next friend; that the defendant is a corporation organized under the laws of Ohio and doing business in Columbus, Ohio; that on the ninth day of June, 1912, and long prior thereto the defendant was engaged in the manufacturing business at Columbus, Ohio, and was employing many men regularly in the same business in and about the same establishment and had not paid into the State Insurance Fund any premiums provided by the Act of the General Assembly of Ohio known as the Workmen's Compensation Law which was then in force, and which was passed May 31, 1911, Sections 1465-37 to 1465-81, inclusive, of the General Code.

Defendant further admits that in the conduct of its business it used several buildings and several acres of land; that on the south side of the grounds or lands used in the business of the defendant was the railroad track or switch used for the purpose of storing railroad cars; that on the twenty-ninth day of July, 1912, there were seven freight cars standing upon said switch and between the fifth and sixth cars from the east was an opening of about three feet; that between said switch and the fence on the extreme south side of said lands were

two piles of lumber; that while plaintiff was passing between said cars the defendant caused to run against the cars standing on the east end of said switch a cut of cars pushed by an engine, and said cars which were standing on said switch were pushed together, and plaintiff was caught about the hips between said fifth and sixth cars.

Defendant further admits that said engine and cars were in charge of a conductor whose duty it was to control the movement of said cars and give signals to the engineer running said locomotive, make the necessary couplings and uncouplings between said cars, watch the tracks on which said cars were moving, and do any and all other things incident to the control or movement of said cut of cars; and that no signals or warning was given to plaintiff.

Defendant further admits that as the result of said accident plaintiff's hips and legs were injured; that plaintiff suffered pain of body; that prior to said accident plaintiff was an able bodied man and was earning about $1.75 per day.

Further answering herein defendant denies each and every allegation and averment in said petition contained not herein admitted to be true.

First Defense:

Defendant for its first defense herein says that all of the circumstances and conditions surrounding plaintiff at the time of his said injury were all well known to him or by the exercise of reasonable and ordinary care would have been known to him and were incident to his employment, and the risks of injury therefrom or thereby were assumed by him.

Second Defense:

Defendant for its second defense herein denies that it was guilty of any negligence or carelessness and says that if it were negligent in any of the respects alleged in said petition the plaintiff himself was guilty of negligence which directly contributed to and was the direct and proximate cause of his said injury, in that he knew or by the exercise of reasonable and ordinary care ought to have known the danger of crossing the switch between said cars, and that with said knowledge or that knowledge which by the exercise of due care he would have had the said plaintiff negligently and carelessly crossed said track between said cars and was injured as the result of his own carelessness and failure to use due care in the premises.

Arnold & Game,
Attorneys for Defendant.

[Duly verified.]

Reply.

[Filed November 24, 1913.]

The plaintiff denies each and every allegation of the answer of the defendant contained in the alleged first and second defenses thereof.

Wilson & Rector and
Fred M. McSweeney,
Attorneys for Plaintiff.

[Duly verified.]

Motion for New Trial.

[Filed November 28, 1913.]

Now comes the defendant and moves the court to vacate and set aside the verdict of the jury in favor of the plaintiff rendered herein on the twenty-fifth day of November, 1913, and to grant a new trial in this action,

for the following reasons and causes affecting materially the substantial rights of the defendant, to wit:

First: Excessive damages appearing to have been given under the influence of passion or prejudice, and aggravated by the circumstances attending the appearance of the plaintiff at the trial for beyond what would be reasonable compensation to the plaintiff for his loss of time, loss of earning power and reasonable and proper allowance for pain and suffering.

Second. Errors of the court in the admission of evidence offered by the plaintiff, to which the defendant at the time excepted.

Third. Errors of the court in the exclusion of evidence offered by the defendant, to which the defendant at the time excepted.

Fourth. Errors of the court in refusing to give to the jury the third, fourth and seventh written requests for instructions to the jury requested to be given by the defendant before the arguments in said cause, to which the defendant at the time excepted.

Fifth. Errors of the court in the charge to the jury at the close of the arguments of said cause, to which the defendant at the time excepted.

And thereupon the defendant filed with the court and submitted to the court, certain special instructions in writing with the request that the court give each and all in charge to the jury, not as a whole or as a series, but as separate and distinct propositions of law, requesting that the same be given before argument of counsel to the jury; which said special instructions, with the caption omitted, are in the words and figures following, to wit:

Now comes the defendant at the conclusion of the evidence and presents the following written instructions

to the court on matters of law, and requests that said instructions and each of them be given to the jury separately, but not as a whole, before the arguments of counsel. Said instructions are numbered one to eight inclusive, and are hereto attached.

Arnold & Game,
W. W. Carlisle,
Attorneys for Defendant.

Defendant's Request No. 3.

Plaintiff by entering the employ of the defendant and engaging in the work which he was employed to perform, assumed the ordinary and usual risk of injury incident to such employment. He is presumed to have had knowledge of those circumstances and conditions which men of ordinary skill and prudence, under the same or similar circumstances exercising ordinary care for their own safety, would never had. It was the duty of plaintiff to use his senses to the same extent that men of ordinary care and prudence would, under the same or similar circumstances, to discover existing dangers; and if plaintiff's injury was caused by any danger which was one of the ordinary risks incident to his employment and which was known to him, or which could have been known to him by the exercise of reasonable and ordinary care on his part, then plaintiff cannot recover, and your verdict should be for the defendant.

Defendant's Request No. 4.

Plaintiff upon entering the employment of the defendant assumed the ordinary risks of the business incident to his employment which, considering his age, intelligence and experience, he knew, or by the exercise of ordinary care could have known. Included in the risks assumed by him was the possibility of his receiving an

injury through the negligence of a fellow servant engaged in the same general employment.

Defendant's Request No. 7.

If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant.

And thereupon, at the conclusion of the argument of counsel to the jury, the court charged the jury in writing as follows, to wit:

Charge.

Evans, J.:

Gentlemen of the Jury: The plaintiff in this case, Harry O. Blagg, by his next friend, Joseph M. Downing, brings this action against the defendant, the Jeffrey Manufacturing Company, and seeks by his action to recover against the defendant damages for injury which the plaintiff alleges he sustained by reason of the negligence of the defendant. The plaintiff in substance in his petition states that on the ninth day of June, 1912, that he was engaged as an employe of the defendant, the Jeffrey Manufacturing Company, which defendant company he alleges employs hundreds of men regularly in the same business and in and about the same establishment, and has not paid into the State Insurance Fund any premium provided by the act of the General Assemzbly, known as the Workmen's Compensation Law. He further alleges that in the conduct of its business the defendant used many buildings and many acres of land; that on the south side of the grounds and lands used in the business of defendant was a railroad track

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and switch used for the purpose of storing cars; that to the knowledge of the defendant said switch would hold eight ordinary freight cars, and no more, when said cars were crowded closely together; that at the time of said injury, to the knowledge of defendant, there were seven freight cars standing upon said switch and between the fourth and fifth cars was an opening of about three feet, left for the use of employes of the defendant that might have occasion to pass between the ends of said cars, when engaged in the performance of their duty; that between said switch and the fence on the extreme south side of said lands at the times hereinafter mentioned were two piles of lumber; that the plaintiff then employed by the defendant herein had been directed by the defendant to assist in removing said lumber to a point on the north side of said switch; that in so doing it was necessary, as the defendant well knew, and as the plaintiff had been directed and instructed by defendant to do, for the plaintiff to pass through said opening between said fourth and fifth cars on said switch; that while plaintiff following said directions was engaged in said labor and as he was between said cars, the defendant had caused to run against the car standing on the east end of said switch a long cut of cars pushed by an engine, the property of the defendant, with the result that the cars on said switch were jammed and pushed together, the plaintiff was caught about the hips between said fourth and fifth cars. He further alleges that the defendant negligently and carelessly had in charge of said cut of cars, the exact number of which cars being to the plaintiff unknown, but a single man whose duty it was to control the movement of said cars, give the necessary signals to the engineer running said locomotive, make the necessary

couplings and uncouplings between said cars, watch the tracks on which said cars were moving, and give warning to those who might be in danger of injury, and do any and all other things incident to the control or movement of said cut of cars; that at said time the plaintiff had no knowledge that said cut of cars was about to be pushed into said switch or against said east car, and that there was no signal or warning of any kind given to plaintiff of the intention of defendant so to do; that as a result of the injury then and there received the joint of the plaintiff's right hip and leg was mashed, crushed and permanently injured, to such an extent that the same was destroyed and subsequently removed, and the joint and bones of the left hip and leg were so mashed and injured as to render the plaintiff unable to use said leg; that plaintiff, because of said injury, was made to suffer great pain of body and distress of mind, and said suffering since said date has been continuous and will be permanent; that plaintiff throughout the rest of his life will be and remain permanently a cripple, unable to walk, or to engage in his usual or ordinary avocation of a laboring man; that prior to said date the plaintiff was a strong, able-bodied, vigorous man and was earning about two dollars per day. He further alleges that said injury to plaintiff resulted solely from the negligence of the defendant in the following respects, to wit:

First. In causing said cut of cars to be pushed upon and against the car standing upon said switch while plaintiff was between said cars.

Second. In failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or against the car on the east end thereof.

Third. In having an insufficient number of men or employes engaged in the handling and switching of said cut of cars.

The plaintiff prays damages against the defendant in this action in the sum of thirty-five thousand dollars.

For answer to the petition of the plaintiff, defendant says it admits that plaintiff is nineteen years of age and brings this action by Joseph M. Downing, his next friend; admits that the defendant is a corporation organized under the laws of Ohio and doing business in Columbus, Ohio; it admits that on the nineteenth day of June, 1912, and long prior thereto, the defendant was engaged in the manufacturing business at Columbus and was employing many men regularly in the same business in and about the same establishment and had not paid into the State Insurance Fund any premiums provided by the act of the General Assembly known as the Workmen's Compensation Law. The defendant further admits in its answer that in the conduct of its business is used several buildings and several acres of land; that on the south side of the grounds or lands used in the business of the defendant was a railroad track or switch used for the purpose of storing cars; that on the twenty-ninth day of July, 1912, there were seven freight cars standing upon said switch and between the fifth and sixth cars from the east was an opening of about three feet; that between said switch and the fence on the extreme south side of said lands were two piles of lumber; that while plaintiff was passing between said cars the defendant caused to run against the cars standing on the east end of said switch a cut of cars pushed by an engine, and said cars which were standing on said switch were pushed together; the plaintiff was caught about the hips between said fifth and sixth cars. Defendant fur-

ther admits that said engine and cars were in charge of a conductor whose duty it was to control the movement of said cars and give signals to the engineer running said locomotive, make the necessary couplings and uncouplings between said cars, watch the tracks on which said cars were moving and do any and all other things incident to the control or movement of said cut of cars; and that no signals of warning were given to plaintiff. The defendant further admits that as a result of said accident plaintiff's hips and legs were injured; that plaintiff suffered pain of body; that prior to said accident plaintiff was an able-bodied man and was earning about a dollar and seventy-five cents per day. The defendant further answering herein denies each and every allegation and averment in said petition contained not herein admitted to be true.

The answer of the defendant further contains, as alleged therein, the first defense and second defense. The substance of the first defense is that the plaintiff knew the circumstances and conditions surrounding himself at the time of his injury, or should have known them by the exercise of reasonable and ordinary care and that the injury sustained by him was by reason of the risks of injury assumed by him at said time and place. The second defense is in substance a denial by defendant that it was guilty of any negligence or carelessness, and further alleges that if it was negligent in any of the respects alleged in the petition that the plaintiff himself was guilty of negligence which directly contributed to and was directly the proximate cause of his injury.

In respect to said first and second defenses so specified in the answer of the defendant, I charge you that under the law of the State of Ohio that was in force and

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operation at the time of the injuries herein complained of, it was provided that all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment who shall not pay into the State Insurance Fund the premium provided by this act shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents, or employes, and that in such action the defendant shall not avail himself or itself of the following common law defenses, to wit, the defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence. That by operation of said statute, the substance of which I have heretofore stated, the defense of the assumption of risk by the plaintiff and the defense of the fellow servant rule or the defense of contributory negligence cannot operate as a defense in this case, you may, however consider the second defense so far as the denial therein contained that the defendant was guilty of any negligence or carelessness, and you may also consider such in so far as it may have application under the eighth special request of the defendant which I have heretofore given to you.

To the answer of the defendant the plaintiff denies each and every allegation of the answer of the defendant contained in the alleged first and second defenses thereof. Such are the pleadings in the case, gentlemen of the jury, and from the pleadings in the case are to be determined the issues that are involved in the trial of the case. The action is one in negligence in which the plaintiff charges that his said injuries were caused by the negligent acts of defendant and he seeks to recover

damages against the defendant therefor. The specific acts of negligence charged by the plaintiff are, first, that the defendant caused said cut of cars to be pushed upon and against the cars standing upon said switch while plaintiff was between said cars.

Second. That the defendant failed to warn and notify the plaintiff of the intention of defendant to push said cars into and upon said switch or against the car on the east end thereof.

Third. That the defendant had an insufficient number of men or employes engaged in the handling or switching of said cut of cars.

The defendant denies that plaintiff's said injuries were caused by the negligent acts of defendant. This denial of the defendant puts in issue the question as to whether or not the defendant was negligent as charged in the petition, and puts in issue the charge of plaintiff that defendant's negligent acts caused the injuries of which plaintiff complains. Hence, the burden of proof devolves upon the plaintiff before he can recover to prove by a preponderance of the evidence—which means a greater weight of the evidence—that the defendant was negligent in the respects complained of in the petition — or some one or more of them—and that the injury the plaintiff sustained resulted directly from such negligence as the proximate cause thereof. If plaintiff has proved by a preponderance of the evidence that defendant was negligent in any one or all of the particulars complained of and if such negligence was the proximate cause of the injury to plaintiff of which he complains, in that event the plaintiff would be entitled to your verdict.

If the defendant was negligent in the particulars complained of, or in any of them, or if defendant was negligent, but if the negligence of the defendant was not the

proximate cause of plaintiff's said injuries, then in that event the plaintiff could not recover and your verdict should be for the defendant. In determining these questions as well as all other questions submitted to you, you will carefully consider all the testimony before you, giving it all such weight as in your best judgment it is entitled to. You are the sole judges of the facts in the case and the weight of the evidence and of the credibility of the witnesses. In weighing the testimony you should consider all the facts and circumstances, and in weighing the testimony of the witnesses you may properly take into account any interest, if any, of the witnesses in the result of the trial, his appearance upon the witness stand, his manner of testifying, his apparent intelligence or lack of intelligence, his opportunities for seeing or knowing the things that he has testified to, and from these and all other circumstances appearing in connection with the testimony on the trial the jury has the right to determine which witness is more worthy of credit and to give credit accordingly, and you will determine all the facts from the evidence in the light of the law as the court instructs you. Negligence in the law is defined as being the want of ordinary care, and may consist in doing something which ought not to be done or in not doing something which ought to be done. Ordinary care means that degree of care which persons of ordinary care and prudence are accustomed to use and employ in the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished. As I have heretofore stated to you the negligent acts complained of in order to enable the plaintiff to recover must have been the proximate cause of his injury. By

the term "proximate cause" is meant the cause which directly produced the injury.

The relation between the plaintiff and the defendant was that, known in the law, as master and servant. It was the duty of the defendant as such master to use ordinary and reasonable care in providing for its employes a safe and suitable place in which to do their work. The defendant was not required to use extraordinary care, nor was it required to do what was unreasonable or impractical, taking into consideration all the circumstances. It is required to use what would be reasonable care under the circumstances of the case. It is claimed by plaintiff, then employed by the defendant, that he was directed by defendant through a foreman to assist in removing certain lumber from a point between such switch and a fence on the south side of said land to a point north of said switch, and that in so doing it was necessary and that he was so directed to do, for plaintiff to pass through an opening between the fourth and fifth cars on said switch. He claims that this opening between said cars was left for the use of employes of defendant that might have occasion to pass between the ends of said cars in the performance of their duties. But he claims that while he was so employed in said labor and as he was between the cars that defendant caused to run against the car standing on the east end of the switch a long cut of cars pushed by an engine which resulted in the cars being jammed and pushed together and that he was caught about the hips and received the injuries complained of. If you find by preponderance of the evidence that the plaintiff was directed by a foreman of the defendant company as a part of his duty to assist in removing the lumber to the north side of said switch and if in so doing it was necessary for

plaintiff to pass through said opening between said cars on said switch and if plaintiff was performing such duty and in so doing you find he was following the instructions of the foreman, in so doing, then, I charge you that under the law it would be the duty of the defendant to give notice or some warning to the plaintiff while so engaged of its intention to run said cars upon said switch.

It is the duty of a company operating locomotives and cars to make such regulations or provisions for the safety of its employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties. If said foreman of said company was by the company put in charge of a set of hands whose business it was to remove lumber or other material from one part of the company's yards to another, and if it was necessary in this case, and if the plaintiff had been instructed by the foreman, to go across said switch and remove lumber from a point between said switch and said fence to some place on the opposite side of said switch. If the plaintiff was then under the instruction of said foreman in the performance of said duties, then it would be the duty of the foreman in putting the plaintiff to work under such circumstances, if you find he so did, to use reasonable care to protect the plaintiff while thus engaged from the dangers arising from the switching of cars upon said track and it would be the duty of the foreman under such circumstances, if such you find, to have taken proper steps to have given notice or some warning to the plaintiff of the intention to move said cars at said time and place, and if you find by a preponderance of the evidence that plaintiff was at said time and place acting under the directions and instruction of said foreman, and if you further find that said cars were moved upon said switch by the defendant

without any notice or warning of the approach of said cars at said time and place, or if you further find that the defendant was negligent in not having a sufficient number of men or employes engaged in the handling and switching of said cut of cars to assist in the running of the same or in giving signals for the protection of employes working on or about said track, and if you further find that the defendant was negligent in any of the particulars specified in the petition and that such negligence was the proximate cause of the injury to the plaintiff, in that event your verdict should be for the plaintiff.

It is your duty to look to the evidence under all the circumstances of the case under the instructions of the court and determine if the defendant was negligent as charged by plaintiff in all or any one or more of the particulars set forth in the petition, and if you find that the defendant was negligent in all or any of said particulars then you will look to the evidence and determine if said negligence was the proximate cause of the injury sustained by the plaintiff. If upon the other hand, if the plaintiff has failed to prove any of the acts of negligence alleged by him in his petition against defendant, or if you find that the defendant was negligent in some one or all of said particulars, but if you find that the negligence of the defendant was not the proximate cause of plaintiff's injury, then your verdict should be for the defendant.

If you find that the defendant is liable under the evidence, and under the instructions of the court, you will award the plaintiff such sum as damages as will fairly and justly compensate him for his injury. The measure of his damages is compensation, and only compensation. You will take into consideration the nature of the injury, the extent of it, the pain which he has suffered. You will

consider the effect of the injury, the permanency of it, the effect of the injury upon his bodily strength, his distress of mind, if any, and upon his capacity to labor and earn a living; the time he has actually lost by reason of his injuries, and all the circumstances, and you will calmly and deliberately apply your best judgment to the evidence in the case; and if you find in favor of the plaintiff you will award to him such damages as will fairly and justly compensate him for his injury; but not, in any event, in excess of the amount prayed for in the petition.

In determining the issues you will be governed by the testimony that you have heard introduced here before the court upon the trial in the light of the law as the court has instructed you. It is your duty to give the testimony your careful and deliberate consideration in order that when you reach your verdict you may do justice between the parties.

I now submit this case to you. You will retire to your jury room, select one of your number foreman, and when you have agreed upon a verdict, have your foreman sign it and return it into court. Forms of verdicts will be furnished and sent to your jury room.

Evans, J.

(Senate Bill No. 127.)

An Act.

To Create a State Insurance Fund for the Benefit of Injured, and the Dependents of Killed Employes, and to Provide for the Administration of Such Fund by a State Liability Board of Awards.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 1465-37. Section 1. There is hereby created a state liability board of awards, to be composed of three

members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term.

Sec. 1465-38. Section 2. Each member of the board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duty as such member, or serve on or under any committee of any political party.

Sec. 1465-39. Section 3. Each member of the board shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of state officers are paid.

Sec. 1465-40. Section 4. The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open to the public, and shall stand and be adjourned without further notice thereof on its records. All proceedings of the board shall be shown on its records of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast.

Sec. 1465-41. Section 5. A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining

members to exercise all the powers of the full board so long as a majority remains. Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the board. All investigations, inquiries, hearings and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its records of proceedings, shall be deemed to be the order of the board.

Sec. 1465-42. Section 6. The board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expenses shall be audited and paid out of the state treasury. The board may hold sessions at any place within the state.

Sec. 1465-43. Section 7. The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board.

Sec. 1465-44. Section 8. The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury

to employes, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudication and awards shall be made.

Sec. 1465-45. Section 9. Every employer shall furnish the board, upon request, all information required by it to carry out the purposes of this act. The board or any member thereof or any person employed by the board for that purpose, shall have the right to examine under oath any employer or officer, agent or employe thereof.

Sec. 1465-46. Section 10. Every employer receiving from the board any blank with directions to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the board within the period fixed by the board for such return.

Sec. 1465-47. Section 11. Each member of the board, the secretary and every inspector or examiner appointed by the board shall for the purpose contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

Sec. 1465-48. Section 12. In case of disobedience of any person to comply with the order of the board, or

subpoena issued by it as one of its inspectors, or examiners, or on the refusal of witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoena issued from such court on a refusal to testify therein.

Sec. 1465-49. Section 13. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the board. No witness subpoenaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated.

Sec. 1465-50. Section 14. In an investigation, the board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas.

Sec. 1465-51. Section 15. A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the board, being certified by such stenographer to be a true

and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and subscribed may be received in evidence by the board with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in the courts of common pleas.

Sec. 1465-52. Section 16. The board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable, and it shall be the duty of insured employers to constantly keep on hand sufficient supply of such blanks.

Sec. 1465-53. Section 17. The state liability board of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employes in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.

Sec. 1465-54. Section 18. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers as herein provided,

according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes of which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursements of said fund.

Sec. 1465-55. Section 19. The treasurer of state shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards.

Sec. 1465-56. Section 20. The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for.

Sec. 1465-57. Section 20-1. Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, wherever occurring, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employer of his right of action as aforesaid.

Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employes of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

Sec. 1465-58. Section 20-2. For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes, shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to wit: Ninety per cent. of the premium shall be paid by the employer and ten per cent. by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund.

Sec. 1465-59. Section 21. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued.

Sec. 1465-60. Section 21-1. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

Sec. 1465-61. Section 21-2. But where a personal injury is suffered by an employe, or when death results to an employe from personal injuries while in the employ of an employer in the course of employment, and such employer has paid in to the state insurance fund the premium provided for in this act, and in case such injury has arisen from the wilful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or

lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employes then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employe, or his legal representatives in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employe, or to his legal representative in case death results, except as provided in this act.

Every employe, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employe or his legal representative in case death results, who exercised his option to institute proceedings in court as provided in Section 21-2, waives his right to any award; except as provided in Section 36 of this act.

Sec. 1465-62. Section 23. The board shall disburse and pay from the fund, for such injury, to such employes, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however, in any case, to exceed the sum of two hundred dollars, in addition to such award to such employe.

Sec. 1465-63. Section 24. In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred and fifty dollars, shall be paid from the fund, in addition to such award to such employe.

Sec. 1465-64. Section 25. No benefits shall be allowed for the first week after the injury is received, except the disbursements provided for in the next two preceding sections.

Sec. 1465-65. Section 26. In case of temporary or partial disability the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employe's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury nor to exceed three thousand four hundred dollars in amount from that injury.

Sec. 1465-66. Section 27. In case of permanent total disability the award shall be 66 2/3% of the average weekly wage, and shall continue until the death of the person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week then he shall receive his full wages.

Sec. 1465-67. Section 28. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in Sections 23 and 24.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-

thirds per cent. of the average weekly wage and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.

Sec. 1465-68. Section 29. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor.

Sec. 1465-69. Section 30. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board.

Sec. 1465-70. Section 31. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

Sec. 1465-71. Section 32. If it is established that the injured employe was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

Sec. 1465-72. Section 33. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified.

Sec. 1465-73. Section 34. The board, under special circumstances, and when the same is deemed advisable,

may commute periodical benefits to one or more lump sum payments.

Sec. 1465-74. Section 35. Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employes or their dependents.

Sec. 1465-75. Section 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final

judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board.

The costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases.

Sec. 1465-76. Section 36-1. Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment, is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.

Sec. 1465-77. Section 37. The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in Section 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerk, and other assistants, and all other expenses of the board herein authorized including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of the state, who shall issue his warrant therefor as in other cases.

Sec. 1465-78. Section 38. No provision of this act relating to the amount of compensation shall be considered by, or called to the attention of the jury on the trial of any action to recover damages as herein provided.

Sec. 1465-79. Section 39. Annually on or before the fifteenth day of November, such board, under the oath of at least two of its members, shall make a report to the

governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such board deems it proper to call to the attention of the governor, including any recommendations it may have to make.

Section 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board.

Section 41. The expense of such board in carrying out the provisions of this act shall be paid from January 1, 1912, to January 1, 1913, out of the general revenue fund of the state not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members.

SUPREME COURT OF THE UNITED STATES.

The Jeffrey Manufacturing Company,
Plaintiff in Error,
vs.
Harry O. Blagg, by Joseph M. Downing,
His Next Friend,
Defendant in Error.

No. ———.

Affidavit.

State of Ohio, Franklin County, ss.:

Harry O. Blagg, being first duly sworn, deposes and says that he is the defendant in the foregoing action; that the judgment sought to be reversed herein was recovered by affiant in the Court of Common Pleas of Franklin county, Ohio, on the twenty-fifth day of November, 1913, as a result of injuries suffered by affiant while in the employ of the plaintiff in error in the city of Columbus, Ohio, on or about the ninth day of June, 1912; that solely as a result of said injuries and since said ninth day of June, 1912, affiant has been wholly and totally disabled from performing any and every kind of work or labor; that neither of the affiant's parents are living; that he is under 21 years of age and in destitute circumstances and is dependent entirely on the charity of his friends and the public for the common necessities of life; that on account of his helpless condition he is unable to earn his own livelihood and has no expectancy or means of maintenance except that represented by the judgment rendered herein in the Court of Common Pleas of Franklin county, Ohio.

Harry O. Blagg.

Sworn to before me and subscribed in my presence by the said Harry O. Blagg this twenty-fifth day of June, 1914.

[Seal.] Gail L. Hesse,
Notary Public in and for Franklin County, Ohio.

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IV.

Appendix A.

Ohio Workmen's Compensation Law.....46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I

STATEMENT.

This proceeding involves the constitutionality of the Act of the General Assembly of the State of Ohio approved June 15, 1911, (102 O. L., 524) entitled:

> 'An Act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards.''

This Act is generally known as the "Ohio Workmen's Compensation Law' and the full text will be found in Appendix A. The operation of the Act was limited to certain industries by the following provisions (Sections 1465-57 and 1465-60 of the Ohio General Code):

> "Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, wherever occurring, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employe of his right of action as aforesaid." (Section 20-1.)
>
> "All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:
>
> "The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence." (Section 21-1.)

Plaintiff in error contends that the classification created by these sections is arbitrary and unreasonable and

is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The defendant in error seeks in this action to recover damages for injuries received while in the employ of the plaintiff in error, and in its answer the plaintiff in error made the defenses of the fellow-servant rule and assumed risk rule, and alleged that the plaintiff was guilty of negligence directly contributing to his injury. These defenses were not attacked by motion or demurrer.

The plaintiff in error questioned the validity of the Act in the following manner

(a) By setting up in its answer the defenses of assumed risk and contributory negligence, and by its denial raising the defense of the fellow-servant rule.

(b) By submitting to the trial court written requests that the jury be instructed as to these defenses, which instructions the court refused to give.

(c) By excepting to the general charge of the court wherein the court instructed the jury that by virtue of the Act the plaintiff in error could not avail itself of these defenses.

(d) In the motion for a new trial by alleging error of the trial court in refusing to give the requests and in so charging the jury.

(e) By alleging in the petition in error from the Court of Common Pleas to the Court of Appeals that the Court of Common Pleas erred in refusing to give the requests, in so charging the jury and in overruling the motion for a new trial.

(f) By alleging in the petition in error from the Court of Appeals to the Supreme Court of Ohio that the Court of Appeals erred in affirming the judgment of the Court of Common Pleas.

(g) The Supreme Court of Ohio affirmed the judgment of the Court of Appeals, and found that the provisions of the Act "are valid and are not in violation of or repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

II

SPECIFICATION OF ERRORS.

The plaintiff in error claims that the Court of Common Pleas erred in refusing to give the written requests as to the three defenses during the trial of the case; in charging the jury that by reason of the Act the plaintiff in error could not avail itself of these defenses; and in overruling the motion of the plaintiff in error for a new trial.

The plaintiff in error also claims that the Court of Appeals and the Supreme Court of Ohio erred in sustaining the validity of the Act and in affirming the judgments rendered in the lower courts.

The written requests for instructions made by plaintiff in error at the trial of the case in the Common Pleas Court are as follows:

Third request.

> "Plaintiff by entering the employ of the defendant and engaging in the work which he was employed to perform, assumed the ordinary and usual risks of injury incident to such employment. He is presumed to have had knowledge of those circumstances and conditions which men of ordinary skill and prudence, under the same or similar circumstances exercising ordinary care for their own safety, would have had. It was the duty of plaintiff to use his senses to the same extent that men of ordinary care and pru-

dence would, under the same or similar circumstances, to discover existing dangers; and if plaintiff's injury was caused by any danger which was one of the ordinary risks incident to his employment and which was known to him, or which could have been known to him by the exercise of reasonable and ordinary care on his part, then plaintiff cannot recover, and your verdict should be for the defendant."

Fourth request.

"Plaintiff upon entering the employment of defendant assumed the ordinary risks of the business incident to his employment which, considering his age, intelligence and experience, he knew, or by the exercise of ordinary care could have known. Included in the risks assumed by him was the possibility of his receiving an injury through the negligence of a fellow servant engaged in the same general employment.

Fellow servants are those who are in the employ of the same master, engaged in the same common enterprise, and who are employed to perform duties and services tending to accomplish the same general purpose and having no authority, direction or control over any employe engaged in the same general employment.

If you find from the evidence that plaintiff's injury was caused by the negligence of a fellow servant, then plaintiff cannot recover, and your verdict shall be for the defendant."

Seventh request.

"If you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant."

The trial court in the general charge instructed the jury as follows:

> "The answer of the defendant further contains, as alleged therein, the first defense and second defense. The substance of the first defense is that the plaintiff knew the circumstances and conditions surrounding himself at the time of his injury, or should have known them by the exercise of reasonable and ordinary care and that the injury sustained by him was by reason of the risks of injury assumed by him at said time and place. The second defense is in substance a denial by defendant that it was guilty of any negligence or carelessness, and further alleges that if it was negligent in any of the respects alleged in the petition that the plaintiff himself was guilty of negligence which directly contributed to and was directly the proximate cause of his injury.
>
> "In respect to said first and second defenses so specified in the answer of the defendant, I charge you that under the law of the State of Ohio that was in force and operation at the time of the injuries herein complained of, it was provided that all employers who employed five or more workmen or operatives regularly in the same business or in and about the same establishment who shall not pay into the state insurance fund the premium provided by this act shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents, or employes, and that in such action the defendant shall not avail himself or itself of the following common law defenses, to-wit: the defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence. That by operation of said statute, the substance of which I have heretofore stated, the defense of the assumption of risk by the plaintiff and the defense of the fellow servant rule or the defense of contributory negligence cannot operate as a defense in this case."

III

ARGUMENT.

Defendant in error brought his action in the Court of Common Pleas of Franklin county, Ohio, to recover damages from the plaintiff in error for injuries claimed to have been caused by its negligence while he was in its employ. He was employed in cleaning up the yards at the manufacturing plant of the plaintiff in error, near a side track which was used for the storage of cars, and in crossing this track he was caught and injured when the cars were thrown together by an engine operated by the employes of the plaintiff in error.

It was alleged and admitted that the plaintiff in error had not complied with the so-called Workmen's Compensation Act.

The defendant in error alleged that his injuries resulted solely from the negligence of the plaintiff in error in the following respects, to-wit:

> "1. In causing said cut of cars to be pushed upon and against the cars standing upon said switch while plaintiff was between said cars.
>
> "2. In failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or against the car on the east end thereof.
>
> "3. In having an insufficient number of men or employes engaged in the handling and switching of said cut of cars."

The answer, while admitting certain allegations of the petition, denies all allegations of negligence and sets forth the following defenses:

> "Defendant for its first defense herein says that all of the circumstances and conditions surrounding plaintiff at the time of his said injury were all well known to him or by the exercise of reasonable and ordinary care would have been known to him and were incident to his employment, and the risks of injury therefrom or thereby were assumed by him."
>
> "Defendant for its second defense herein denies that it was guilty of any negligence or carelessness and says that if it were negligent in any of the respects alleged in said petition the plaintiff himself was guilty of negligence which directly contributed to and was the direct and proximate cause of his said injury, in that he knew or by the exercise of reasonable and ordinary care ought to have known the danger of crossing the switch between said cars, and that with said knowledge or that knowledge which by the exercise of due care he would have had the said plaintiff negligently and carelessly crossed said track between said cars and was injured as the result of his own carelessness and failure to use due care in the premises."

Under the Ohio practice it is necessary to plead the defenses of assumed risk and contributory negligence. The defense of the fellow servant rule is raised by the defendant's denial. The defendant in error in his reply denied the allegations of the first and second defenses. Under the scintilla rule all issues of fact, including contributory negligence, must, upon the record in this case, have been submitted to the jury under proper instructions by the court.

The trial resulted in a verdict for the defendant in error, the motion of the plaintiff in error for a new trial

was overruled and judgment was entered; the Court of Appeals affirmed the judgment of the Common Pleas Court and the Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

The sole question presented is whether the Ohio Workmen's Compensation Act contravenes the provisions of Section 1 of the 14th Amendment to the Constitution of the United States in that the classification of employers and employes created by the act is arbitrary and unreasonable.

The act attempted to classify industries by the number of employes—four or less and five or more. In the former class the employer could make the defenses of assumed risk, contributory negligence, and fellow servant rule, and in such industries, if either defense existed the employe could not recover. In the latter class the employe could recover if these defenses existed and the employers were deprived of these defenses. In industries employing four or less neither the employer or employe could have the benefits of the act.

The plaintiff in error claims that, considering the purpose of the act and the condition which it was intended to remedy, the classification was arbitrary and unreasonable and invalidated the act.

The state courts during the progress of the case were concluded by the decision of the Supreme Court of Ohio rendered February 6, 1912, in the case of State ex rel. vs. Creamer, Treas., 85 O. S., 349, in which it was held:

> "The act entitled 'An act to create a state insurance fund for the benefit of injured, and the dependent of killed employes,' etc., 102 O. L., 524, is a valid exercise of legislative power not repugnant to the federal or state constitutions, or any limitation contained in either."

Of the six judges Shauck and Davis did not concur.

The act known as the "Ohio Workmen's Compensation Law" was one of the numerous state enactments passed as the result of a widespread agitation for a change in the system of compensating injured employes. The Ohio act is, fundamentally and in detail, different from acts passed in other states. We do not believe a determination of the validity of the act of any other state is conclusive as to the constitutionality of the Ohio act.

In the determination of the reasonableness of the classification created by the Ohio act it is necessary to consider the object sought to be accomplished by it and the condition to which it was intended to apply. We may well consider the atmosphere at the time it was passed. For several years statesmen, economists, politicians and demagogues had discussed the condition and had suggested the remedies. The economic and legal questions had been discussed pro and con. Many plans had been presented to remove the evil, arguments had been made from many angles, and the interests of the employe, employer, and the public had received a great deal of consideration. As a result of this agitation there was undoubtedly a strong demand that laws should be passed on this subject.

As this sentiment crystallized Messrs. John H. Wigmore of Illinois, A. W. Sanborn of Wisconsin and H. V. Mercer of Minnesota were appointed by the Chicago (1910) Conference of State Commissioners on Compensation for Industrial Accidents as a committee to prepare a suitable act. In the preamble to this bill it was recited:

> "Whereas our modern industrial conditions have outgrown the common law and statutory remedies

hitherto given to employes for injuries incident to their employment, and the injuries now annually received by thousands of workmen not only burden the community by converting industry into idleness, plenty into poverty, but also give rise to speculative and unscrupulous litigation which is a disgrace to our system of justice; and

"Whereas, most of the European nations have already corrected and the United States Government and many of our states are now seeking to correct this deplorable condition by a system of assured compensation which will tend to prevent accidents, to support the families, and to safeguard the general welfare of the State, and will provide simplicity, certainty and uniformity of obligation, and simplicity, rapidity and certainty of remedy."

The Ohio commissioners participated in this conference and in January, 1911, made their report. Upon this report the act involved herein was based.

The purpose of the act is defined in its title as follows:

> **"An act to create a state insurance fund for the benefit of injured, and dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards."**

In State ex rel. vs. Creamer, Treas., supra, Judge Johnson clearly stated its purpose when he said:

> **"The statute in question provides for the creation of a State Liability Board of Awards, which shall establish a state insurance fund, from premiums paid by employers and employes in the manner provided in this act. It provides a plan of compensation for injuries, not wilfully self-inflicted, resulting from accidents to employes or employers both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent. respectively. It applies only where the employer has five or more**

operatives regularly in the same business or in or about the same establishment."

* * * * * * * * * *

"The law was passed after a report referred to in the briefs, of a commission appointed by the governor in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws, which have been passed in the effort to improve such conditions. Substantially its conclusions are, that the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound, that there is an intelligent and widespread public sentiment which calls for its modification and improvement, that the general welfare requires it. That there has been an enormous waste under the present system and that the action for personal injuries by employe against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written constitution to limit the legislative power, we in this country have the problem of devising a plan which shall not infringe the fundamental law."

Counsel for defendant in error in their brief on the motion to affirm thus state their conception of its purpose:

"Its object is to substitute for an inadequate, insufficient system, a newer and better theory, placing upon the industries of the State the burden of caring for those who are injured in the course of their employment. It keeps the injured and the dependents of killed employes from becoming a burden on society."

It is apparent that the act had but one object, viz., to furnish a prompt and certain system of compensating an injured employe, in lieu of a system which was believed to be wasteful and uncertain. Taking the act by its four corners and scrutinizing every word in it, no other purpose can be found. The evils of the former system were found in every employment regardless of its size and of the number employed.

The right of an employe to receive compensation for his injuries received in the course of the employment was just as sacred, whether he was employed with three or with a hundred. The duty of an employer to compensate an injured employe was common to all employments and in no way was related to the number of employes. The public was interested in having every injured employe compensated, and its interest was in no way affected by the size of the industry. From the sentimental standpoint and from the legal standpoint the evils of the condition to which this act was intended to apply had no relation to the size of the industry.

Considering this purpose the fact that a man might be working alone, that he might be working with three coemployes, that he might be working with a hundred coemployes, or that he might be working with a thousand coemployes should not detract from his right to expect compensation if injured.

The statement of Mr. Justice Holmes in Engel vs. O'Malley, 219 U. S., 128, 138, has particular application to this act and the situation which it was intended to change:

> "It is true no doubt that where size is not an index to an admitted evil the law cannot discriminate between the great and the small."

We believe that if the act had applied to all employments and industries, regardless of size, it would not have been unconstitutional, and it would have been more satisfactory and more popular than the act which was passed. In the smaller industries employes were arbitrarily prevented from recovering under conditions where the employes in larger industries might recover, and the employers in the larger industries were without reason subjected to burdens from which the smaller industries were exempt. Under this act, employers having four or less employes could not, if they wished, take advantage of the act.

In State ex rel. vs. Creamer, Treas., supra, Judge Johnson said:

> "We think that the classification is reasonable and proper. In the nature of the case the risks of any regular employment are less and the opportunity for avoiding them better when an employe is one of four than when the number is larger. As was said by Winslow, C. J., in Borgnis vs. Falk, supra, 'The difference in the situation is not merely fanciful—it is real.' "

The learned judge suggests that the risks of an employment increase with the number of employes, and relies upon Borgnis vs. Falk, 147 Wis., 327. We submit that the Wisconsin law is essentially different from the Ohio act, as appears in the following quotation from the opinion in Borgnis vs. Falk, supra:

> "It divides all private employers of labor into two classes: (1) those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of the assumption of risk, and negligence of a co-employe from the second class (except that where there are less than four co-em-

ployes, and the latter defense is not disturbed) but leaves both defenses intact to the first class."

We do not see wherein the greater or less risk in an employment should take from an injured employe the right to compensation, or would justify subjecting employes in small industries to burdens from which the employes in larger industries were exempt. We can see no relation between the right to expect compensation for injuries on equal terms and the risks of the business. But what possible relation is there between the right to compensation and the defense of contributory negligence? Contributory negligence is an essential feature of the classification in the act. An employe working with three, if himself negligent, could not recover, while an employe working with four could recover, no matter how negligent he might be. What possible relation could there be between the negligence of the injured employe and his right to compensation? Yet the one could not recover if negligent, while the other could.

It is to be noted that the Ohio Supreme Court does not hold that the safety of the employe is an object of the act. It is also to be noted that the classification under the Wisconsin law does not depend upon the defense of contributory negligence. **All** employers **may**, if they so elect, take advantage of the Wisconsin law. The Ohio Supreme Court refers to the risks of the employment, but ignores the fact that the defense of contributory negligence arises from the act of the injured employe, and is not related to the risks of the employment nor the right to expect compensation for injuries.

Neither the legislative history, the context of the Ohio act, nor the opinion of the Ohio Supreme Court in State

ex rel. vs. Creamer, Treas., supra, suggests that the Ohio act has any purpose to provide for the safety of the employe. Neither suggests any reason within the purpose of the act and the evils sought to be abolished by it why an employe working with three coemployes may not recover if his negligence contributed to his injuries, while if he were working with four or more coemployes, this defense would not preclude a recovery.

We believe that a classification depending upon the defenses of assumed risk and fellow servant rule would create an arbitrary classification, yet our argument will be addressed solely to the question raised by a classification which deprives an employe in industries employing four or less from having a right to recover if negligent, while allowing an employe in an industry employing five or more to recover if negligent.

There is no substantial difference in the principles governing classifications for legislative purposes. The difficulty lies in the application of these principles to the particular case. Were it not that the decisions are to a large extent on a particular state of facts and the particular law under consideration the announcements in many cases would apparently be irreconcilable.

It is fundamental that every classification must be reasonable and not arbitrary. A classification must rest upon distinctions differentiating the classes created. These distinctions must be sought for in the purpose of the act and the condition to which it is intended to apply.

The settled rule in Ohio prior to the decision in State ex rel. vs. Creamer, Treas., supra, was stated by Shauck, J., in Miller vs. Crawford, 70 O. S., 207-214, as follows:

> "While it is not required that every act which restricts the enjoyment of property must affect every

> member of society, it is required that every such act must be founded upon a reason of a public nature, and that the act must affect all who are within the reason for its enactment."

The Supreme Court of Ohio did not expressly overrule this decision, but the recognition of a right to classify as is done in the act under consideration in the case at bar is in effect a reversal of the doctrine announced in that case.

This court has in numerous cases announced general principles defining what a proper classification may be. It has also in numerous cases shown that these general principles are subject to proper limitations in their application. It has also recognized the legislative power to classify and has refused to interfere with legislative action unless it shall clearly appear that the classification is unreasonable and arbitrary.

Perhaps no stronger statement of these limitations can be found than that by Mr. Justice Van Devanter in Lindsley vs. Gas Co., 220 U. S., 59, 76, as follows:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law

was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

We believe that it can be demonstrated that the classification under the act involved in this case is, considering its purpose, entirely unreasonable and arbitrary. It is not a situation where the classification deals with a subject, limits of which are uncertain and doubtful. The effect of the act is to most unreasonably and arbitrarily deprive certain employes of the benefits of the act and burden certain employers in a way that is not connected with and does not in any way subserve the purpose of the act.

In Billings vs. Illinois, 188 U. S., 97-102, Mr. Justice McKenna has outlined the difficulties encountered in defining proper classification as follows:

"But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed all classification—must primarily depend upon purpose—the problem

presented. Science will have one purpose, business another, and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal—may not be within the power of the legislature. To dispute that power, however, is not the same thing as to dispute a classification, and yet that there may be dependence—more freedom of classification in some instances—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products, and permit combinations among those who raise or grow products. 184 U. S., 540, 46 L. Ed., 679, 22 Sup. Ct. Rep., 431. And yet, exercising its taxing power, it has been decided that a state may make that discrimination. 179 U. S., 89, 45 L. Ed., 102, 21 Sup. Ct. Rep., 43. Other illustrations may be taken from the cases which tend to the same end. If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no person or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them must be allowed a wide range of discretion, and that this court will not make itself a harbor in which can be found 'a refuge from ill-advised, unequal and oppressive legislation.' 102 U. S., 691, 26 L. Ed., 238."

Inasmuch as the acts discussed in the cases cited herein are dissimilar to that under consideration in this case we shall not discuss their provisions.

Before discussing these cases we wish to say that we subscribe to the following clear statement of the proper basis of classification for legislative purposes:

> "When there are reasonable economic or political or social reasons for doing so, certain occupations or industries, or even classes of persons may be selected out for special regulation or for the enjoyment of special privileges." Willoughby on the Constitution, Sec. 484.

The case of Barbier vs. Connolly, 113 U. S., 27, has been cited by many litigants in this court who have claimed that a law is unconstitutional because it denies equal protection to those affected by it. In this case Mr. Justice Field said:

> "The 14th Amendment declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment, broad and comprehensive as it is, nor any other amendment was

designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Another leading case is Cotting vs. Goddard, 183 U. S., 79. The act under consideration in that case was general in terms, and classified corporations subject to it by the amount of business done. Inasmuch as the law applied only to one large corporation the arbitrary effect of the law was apparent. In this case will be found an elaborate review of the previous decisions and a recognition of the principles found in these cases. Mr. Justice Brewer (page 100), said:

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his

> claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except that the matter of costs was attached to like failure of other litigants, could it be said that the corporation received the equal protection of the laws? Take another illustration: Suppose a law, which while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good its entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law?"

After reviewing and recognizing the decisions in many of the cases cited in this brief, at page 108 the learned justice quoted with approval the following from State vs. Haun, 61 Kan., 146:

> "The obvious intent of the act is to protect the laborer, and not to benefit the corporation. Why should not the mine employes who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in the one instance, why not in the other? The nine

men lawfully paid for their goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in like business. Such inequality destroys the law. In the instance cited, two of the eleven men might quit the employment of the company for which they worked and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of the act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. * * * A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

And again at page 112 he said

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of the business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the Supreme Court of Kansas in State v. Haun, 61 Kan., 146; 47 L. R. A., 369; 59 Pac., 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the Fourteenth Amendment."

In Railway Company vs. Ellis, 165 U. S., 150-155, the same justice said

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, it is undeniably true (Hayes vs. Missouri, 120 U. S., 68 (30:578); Missouri P. R. Co. v. Mackey, 127 U. S., 205 (32:107); Walston v. Nevin, 128 U. S., 578 (32:544); Bell's Gap R. Co. v. Pennsylvania, 134 U. S., 232 (33:892); Pacific Exp. Co. v. Seibert, 142 U. S., 339 (35:1035, 3 Inters. Com. Rep. 810); Giozza v. Tiernan, 148 U. S., 657 (37:599); Columbus S. R. Co. v. Wright, 151 U. S., 470 (38:238); Marchant v. Pennsylvania R. Co., 153 U. S., 380 (38:751); St. Louis & S. F. R. Co. v. Mathews, 165 U. S., 1 (ante, p. 251), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.
>
> "As well said by Black, J., in State v. Loomis, 115 Mo., 307, 314 (21 L. R. A. 789), in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void; 'Classification for legislative pur-

poses must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'

"In Vanzant v. Waddel, 2 Yerg. 260, 270, Catron, J., (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared 'Every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and coroprate bodies would be governed by one rule, and the mass of the community who made the law, by another.' "

"In Stratton v. Morris (89 Tenn., 497, 12 L. R. A. 70), Baxter, special judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary.' "

In Connolly vs. Union Sewer Pipe Co., 184 U. S., 539, at page 558, Mr. Justice Harlan said

"The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their

necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed., 23, 73; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed., 243, 247; Missouri, K. & T. R. Co. v. Haber, 169 U. S., 613, 626, 42 L. ed. 878, 883, 18 Sup. Ct. Rep., 488.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the law means 'that no person or class of person shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S., 22, 31, sub nom. Bowman vs. Lewis, 25 L. ed., 989, 992. We have also said: 'The Fourteenth Amendment in declaring that no state "shall deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid

upon one man than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' Barbier v. Connolly, 113 U. S., 27, 31; 28 L. ed., 923, 924; 5 Sup. Ct. Rep., 357, 359."

At page 560 the justice applied the principles previously discussed by him to the Illinois Anti-Trust Law, as follows:

"These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts, for any of the purposes named in the act, may be punished as criminals, while agriculturists and live-stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe.

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The

equal protection demanded by the Fourteenth Amendment forbids this * * *. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, — some difference which bears a just and proper relation to the attempted classification,—and is not a mere aribtrary selection.' Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S., 150, 155, 159, 160, 165, 41 L. ed., 666, 668, 670, 671, 17 Sup. Ct. Rep., 255, 257-259, 261. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S., 79, sub nom., Cotting v. Godard, ante, 92, 22 Sup. Ct. Rep., 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stockyards company in the state, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

In Southern Railway Co. vs. Greene, 216 U. S., 400-412, Mr. Justice Day said

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitraily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S., 150, 155, 165; 41 L. ed., 666, 668, 671, 17 Sup. Ct. Rep., 255, Cotting vs. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S., 79, 46 L. ed. 92, 22 Sup. Ct. Rep., 30;

Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 559, 46 L. ed., 679, 689, 22 Sup. Ct. Rep., 431."

In Railway Co. vs. Matthews, 174 U. S., 94, Mr. Justice Brewer, 105, said:

> "While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely aribtrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. In some of them the court was unanimous. In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line."

In Yick Wo vs. Hopkins, 118 U. S., 356, Mr. Justice Matthews, in holding unconstitutional the laundry license ordinance involved in that case, with reference to its arbitrary effect in practical operation at page 373, said:

> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provi-

> sions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearnce, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstnces, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In Railway Company vs. May, 194 U. S., 267, Mr. Justice Holmes at page 269, said:

> "When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

The Act under consideration in the case at bar is justified upon the ground that injured employes and their dependents should be compensated. It is to the public interest that they shall not become public charges. The reasons justifying such a law are ethical and practical. At the same time, if an employe is injured, the considerations which justify a law affording him compensation and the benefit to the public resulting from such compensation, apply equally whether this employe is working with three or one thousand coemployes.

In Lumber Company vs. Bank, 207 U. S., 251, at page 257, Mr. Justice Peckham said:

> "The case of Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 46 L. ed., 679, 22 Sup. Ct. Rep., 431, one of the cases cited by the Circuit Court, is not, in our opinion, applicable. The statute did not apply to agricultural products or live stock while

in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination."

We have already burdened this brief with quotations from the cases which recognize the general principle previously stated, viz. that the basis of a classification must be reasonable and must have relation to the purpose of the law in which it is found. This principle has been recognized in numerous other cases in this court, and has not so far as we have been able to discover been questioned. The difficulty lies in its application to particular cases.

The Supreme Court of Mississipi in Ballard vs. Mississippi Cotton Oil Company, 81 Miss., 507, denied the power of the legislature to make corporations liable for injuries to their employes where other employers were not so made liable, and where there was no difference in the business which would warrant this classification.

The case seems to us to be well reasoned and to have been determined largely upon the decisions of this court. It was said:

"Making all corporations liable for injuries to employes, through defective machinery, notwith-

standing the employes had knowledge of the defect, when the same liability is not placed on private individuals, and there is no distinctive difference in the business which will warrant the classification, denies the corporations the equal protection of the laws."

And further, at pages 412 and 413, it is said

"This act of 1898 under review is assailed as violating the Fourteenth Amendment of the Constitution of the United States, because it denies—as alleged—to corporations the equal protection of the laws in two respects: First, in that it applies to the employes of all corporations, without reference to any differences in the respective business of the corporations; second, because it discriminates between employes of natural persons and of corporations, and the argument is put briefly thus by way of illustration: 'Suppose one man has an independent fortune and has a large body of pine land, say in Clarke county, Mississippi, and being desirous of converting the timber upon these lands into lumber, and recognizing that the sawmill business is hazardous, and likely to impose large liability upon him, he incorporates this business under the name of the Clarke County Sawmilling Company. Alongside of him and his property in Clarke county is an individual owning an equal body of land, who does not see fit to take this precaution. Suppose the boilers of these two sawmills are notoriously weak, and all the employes of both parties are aware of it, and yet they continue to work. Suppose, now, at the same time and from identically the same cause a boiler explosion takes place in both mills. The Clarke County Sawmilling Company would, under the act of 1898, be mulcted in damages, but the individual would not be liable.' And it is urged that the act applies to all corporations, but to no natural person, and, since the natural person and the corporation might be both engaged in precisely the same business, a discrimination in such cases does not rest on any difference in the business. Possibly the

clearest statement of the doctrine contended for by appellee is that stated in Soon Hing v. Crowley, 113 U. S., 708, 709, 28 L. Ed. 1146, 1147, 5 Sup. Ct. Rep., 733, as follows: 'The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.' In the Ellis case, 165 U. S., 150, 41 L. Ed., 566, 17 Sup. Ct. Rep., 255, it is said that the classification must always rest upon 'some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily.'

"Multiplied citations from the United States Supreme Court could be made, but the thought running through them all, as we understand them, clearly is that the classification is not to be made, except upon the basis of some difference between the business of those favored and the business of those not favored—a substantial difference warranting the classification. We have read critically all the decisions cited in the briefs from the United States Supreme Court without finding any decision holding expressly that a statute providing that the employes of all corporations may so recover can be upheld."

In Railway Co. vs. Railroad Commission of Indiana, 173 Ind., 469, the Supreme Court of Indiana said:

"The power of the legislature to classify the subjects of legislation when there is such difference in the situation that a general law cannot, in the opinion of the legislature, be made justly applicable alike to all, is subject to the limitation that the classification must rest on a substantial reason arising from the subject matter, and that the law passed in pursuance of such classification is so framed as to operate alike on all within the class, and when such

reason exists the propriety of the classification is a legislative question only."

A law somewhat similar to the Mississippi law was involved in the case of Bedford Quarries Company vs Bough, 168 Ind., 671, wherein it was said:

"Imposing upon private corporations a liability for injuries to employes, which will not exist in case of individuals or partnerships for injuries arising from the same cause under the same conditions, violates the constitutional provision guaranteeing equal protection of the laws * * *

"It is urged by appellant that said employer's liability act, except as applied to railroads, is in violation of the Fourteenth Amendment of the Constitution of the United States, and therefore void, for the reason that it imposes burdens upon private corporation employers that are not imposed on individual and copartnership employers in the same business under the same circumstances and conditions, and gives a right of action to the employes of private corporations that is not granted to the employes of individuals and co-partnerships under like conditions. Appellee insists that the legislature has the power of classification for legislative purposes, and that the classification in said act was proper.

"The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class; that is, the reason for the classification must inhere in the subject matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally re-

lated. Neither mere isolation, nor arbitrary selection, is proper classification.

"While the employer's liability act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employes of individuals and co-partnerships are excluded from the benefit of its provisions. It gives a right of action to an employe for injuries received while in the service of a private corporation in certain cases, but denies the employe of an individual or co-partnership engaged in the same business a right of action for an injury arising from the same cause and under the same conditions. It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions, are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character of the employment."

Many other cases might be cited to sustain the principles announced in the cases from which we have so profusely quoted. The question is of course as to the application of these principles to the act under consideration in the case at bar.

We do not think it can be disputed that the sole purpose of this act is to substitute for the former unsatisfactory system of compensating injured employes a system which it was believed would do away with the evils of the former system and would furnish prompt and certain benefits to the injured employes.

Under this act we find that employes in industries having four or less employes are debarred from the benefits, and employers in industries having five or more employes are subjected to its burdens.

What difference is there which would justify such a distinction?

The evil was found in every instance where an employe was injured. Accidents and injuries necessarily occur in every industry. The evil therefore was common to all employments. The condition sought to be remedied was not in any way affected by the size of the industry.

At common law an employe if negligent could not recover. His negligence would necessarily be the result of his own act. It would not be affected by the size of the industry and the number of co-employes associated with him. Humane considerations for the employe and his family should certainly have been as strong toward the negligent employe, whether he was associated with three co-employes of whether he was associated with one thousand co-employes. The interest of the public that he and his family should not become public charges was in no wise affected by the number of employes associated with him.

In fact we can find no explanation or justification of a classification, by which an injured employe in a small industry could not recover if he were negligent, while if he were injured under exactly the same conditions in a larger industry he could recover notwithstanding his negligence.

If an employe negligently placed his hand in a press in a small industry and was injured he could not recover. What reasonable explanation can there be why he should be permitted a recovery if he were employed in a larger industry?

If a farm laborer on the ordinary farm placed his hands in a reaper and was injured he could not recover. Upon what reasonable theory should he be allowed a recovery if he happened to be working with five or more laborers?

If a clerk in a store negligently stepped into an open elevator shaft he could not recover. By what reasoning should a recovery be allowed him if he had been working in a department store?

If an employe in a small dynamite factory was injured through his own negligence he could not recover. By what nicety of logic can it be claimed that his situation would be so changed because there were five or more co-employes associated with him that would justify a recovery by him?

If a maid of allwork in the ordinary home negligently burns her hand on the kitchen stove she could not recover. Is it not a reductio ad absurdum to say that because there happened to be four other maids employed in that home the cook was so differently situated that she could recover?

These illustrations might be multiplied, but they clearly show the arbitrary and unreasonable results of the classification found in the act.

We find that under this act there is an arbitrary exclusion of employes and their families, who within every reason justifying the act and within its purpose should receive compensation.

Will it be argued that it is to the public interest that men should work in the larger industries?

Will it be claimed that employes in small industries should be required to exercise greater care for their

safety to justify recovery than if they were employed in larger industries?

Will it be argued that the employe in a small industry if negligent has not an equal right to compensation as the negligent employe who was injured in a large industry?

Is the injured employe and his dependents in a small industry entitled to less consideration than the injured employe and his family in a large industry?

Do not the suffering of the injured employe and the needs of his family in a small industry appeal as strongly, and are they not entitled to as much consideration, as the suffering of the employe and the needs of his family in the larger industry?

These pertinent questions show the unreasonable and aribtrary results of the classification found in the act. The answers are self-evident, and furnishes the answer to the question—Is the classification found in the act so unreasonable and arbitrary as to make it invalid?

Counsel for defendant in error will probably refer to certain decisions of this court and we will therefore briefly refer to them.

In Consolidated Coal Company vs. People of the State of Illinois, 185 U. S., 203, 208, the court sustained an Illinois coal mine inspection law because the classification therein provided was held to be within the purpose of the law, as is found in the following statement by Mr. Justice Brown:

> "In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at

> a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here."

In McLean v. Arkansas, 211 U. S., 542, 552, the court sustained a law upon the ground that the regulation of coal mines therein provided was valid, and that the classification thereby created was proper as within the purpose of the law, as appears in the statement of Mr. Justice Day:

> "It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare."

Counsel may rely upon the decision in Quong Wing vs. Kirkendall, 223 U. S., 59, but this and other cases may be distinguished because a classification for taxation purposes is not governed by the same principles governing classifications for other purposes.

The classification provided by the act has one purpose, viz.: an allowance of compensation to injured employes and granting a right to recover in industries employing five or more even if the injured employe were guilty of contributory negligence. This is an essential feature of the act, so interwoven with other provisions

that it cannot be eliminated without destroying the fundamental provisions of the act. By reason of this the entire act is invalid.

As was said by Mr. Justice Harlan in Connolly vs. Sewer Pipe Co., 184 U. S., 540, at page 565:

> "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

We believe this states the settled rule in this court.

The plaintiff in error is in favor of a system of compensation by which its employes and their dependents

shall be compensated in case of injury or death. If, as the plaintiff in error believes, the act involved in this case is invalid, the General Assembly of Ohio, may, by a law applying to all industries, remove the feature which we believe invalidates the law. At the trial of this case the plaintiff in error was as it believed deprived of its defenses by an Act which infringed upon Section 1 of the Fourteenth Amendment, and it happens to be the litigant who has first presented the question to this court.

We are confident that within the rules announced by this court the act in issue is unconstitutional, and we respectfully submit that the judgments of the Ohio courts should be reversed and that this case should be remanded for re-trial.

H. B. Arnold and
W. Wilson Carlile,
Attorneys for Plaintiff in Error.

Columbus, Ohio, November 7, 1914.

Note.—We have been unable to obtain printed copies of the record and therefore cannot comply with the rule that pages of the record be given where references to the record are made.

APPENDIX A.

AN ACT.

To create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards.

Be it enacted by the General Assembly of the State of Ohio:

Section 1465-37, General Code. There is hereby created a state liability board of awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term. Section 1.

Section 1465-38, General Code. Each member of the board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duty as such member, or serve on or under any committee of any political party. Section 2.

Section 1465-39, General Code. Each member of the board shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of state officers are paid. Section 3.

Section 1465-40, General Code. The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open to the public, and shall stand and be adjourned without further notice thereof on its records. All proceedings of the board shall be shown on its record of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast. Section 4.

Section 1465-41, General Code. A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining members to exercise all the powers of the full board so long as a majority remains. Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the board. All investigations, inquiries, hearings and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the board. Section 5.

Section 1465-42, General Code. The board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expenses shall be audited and paid out of the state treasury. The board may hold sessions at any place within the state. Section 6.

Section 1465-43, General Code. The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board. Section 7.

Section 1465-44, General Code. The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury to employes, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made. Section 8.

Section 1465-45, General Code. Every employer shall furnish the board, upon request, all information required by it to carry out the purposes of this act. The board or any member thereof, or any person employed by the board for that purpose, shall have the right to ex-

amine under oath any employer or officer, agent or employe thereof. Section 9.

Section 1465-46, General Code. Every employer receiving from the board any blank with directions to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the board within the period fixed by the board for such return. Section 10.

Section 1465-47, General Code. Each member of the board, the secretary and every inspector or examiner appointed by the board shall, for the purposes contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. Section 11.

Section 1465-48, General Code. In case of disobedience of any person to comply with the order of the board, or subpoena issued by it as one of its inspectors, or examiners, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoena issued from such court on a refusal to testify therein. Section 12.

Section 1465-49, General Code. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the board. No witness subpoenaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated. Section 13.

Section 1465-50, General Code. In an investigation, the board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas. Section 14.

Section 1465-51, General Code. A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and subscribed, may be received in evidence by the board with the same effect as if such stenographer were present and testified to the

facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in courts of common pleas. Section 15.

Section 1465-52, General Code. The board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable, and it shall be the duty of insured employers to constantly keep on hand a sufficient supply of such blanks. Section 16.

Section 1465-53, General Code. The state liability board of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employes in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year. Section 17.

Section 1465-54, General Code. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers of labor and employes as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such em-

ployes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund. Section 18.

Section 1465-55, General Code. The treasurer of state shall be the custodian of the state insurance fund, and all disbursement therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards. Section 19.

Section 1465-56, General Code. The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for. Section 20.

Section 1465-57, General Code. Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, wherever occurring, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employe of his right of action as aforesaid.

Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made

such payment; and the same, when so posted, shall constitute sufficient notice to his employes of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted. Section 20-1.

Section 1465-58, General Code. For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to wit: Ninety per cent. of the premiums shall be paid by the employer and ten per cent. by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund. Section 20-2.

Section 1465-59, General Code. The state liability board of awards shall disburse the state insurance fund

to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self inflicted, or to their dependents in case death has ensued. Section 21.

Section 1465-60, General Code. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence. Section 21-1.

Section 1465-61, General Code. But where a personal injury is suffered by an employe, or when death results to an employe from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the wilful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance

or lawful order of any duly authorized officer, or any statute for the protection of the life, or safety of employes, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employe, or his legal representative, in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employe, or to his legal representative, in case death results, except as provided in this act.

Every employe, or legal representative, in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employe or his legal representative, in case death results, who exercises his option to institute proceedings in court as provided in section 21-2, waives his right to any award; except as provided in section 36 of this act. Section 21-2.

Section 1465-62. The board shall disburse and pay from the fund, for such injury, to such employes, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however, in any case, to exceed the sum of two hundred dollars, in addition to such award to such employe. Section 23.

Section 1465-63, General Code. In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred and fifty dollars, shall be paid from the fund, in addition to such award to such employe. Section 24.

Section 1465-64, General Code. No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections. Section 25.

Section 1465-65, General Code. In case of temporary or partial disability, the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employe's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed three thousand four hundred dollars in amount from that injury. Section 26.

Section 1465-66, General Code. In case of permanent total disability the award shall be 66 2/3% of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employe's wages were less than five dollars per week, then he shall receive his full wages. Section 27.

Section 1465-67, General Code. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in Sections 23 and 24.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to con-

tinue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars. Section 28.

Section 1465-68, General Code. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor. Section 29.

Section 1465-69, General Code. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board. Section 30.

Section 1465-70, General Code. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits. Section 31.

Section 1465-71, General Code. If it is established that the injured employe was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage. Section 32.

Section 1465-72, General Code. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified. Section 33.

Section 1465-73, General Code. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments. Section 34.

Section 1465-74, General Code. Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employes or their dependents. Section 35.

Section 1465-75, General Code. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was

inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board.

The costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases. Section 36.

Section 1465-76, General Code. Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment, is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act. Section 36-1.

Section 1465-77, General Code. The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks and other assistants, and all other ex-

penses of the board herein authorized including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of state, who shall issue his warrant therefor as in other cases. Section 37.

Section 1465-78, General Code. No provision of this act relating to the amount of compensation shall be considered by, or called to the attention of the jury on the trial of any action to recover damages as herein provided. Section 38.

Section 1465-79, General Code. Annually on or before the fifteenth day of November, such board, under the oath of at least two of its members, shall make a report to the governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such board deems it proper to call to the attention of the governor, including any recommendations it may have to make. Section 39.

The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board. Section 40.

The expenses of such board in carrying out the provisions of this act shall be paid from January 1, 1912, to January 1, 1913, out of the general revenue fund of the state not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members. Section 41.

Passed May 31st, 1911.

Approved June 15th, 1911.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 1101.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO AFFIRM OR DISMISS.

This proceeding involves the validity of the act of the Ohio General Assembly approved June 15, 1911 (102 O. L., 524), known as the "Ohio Workmen's Compensation Law."

The defendant in error has filed a motion to affirm the judgment or dismiss the writ of error herein, and if said motion is overruled, to advance this cause for trial.

I.

THE MOTION TO DISMISS.

The argument for defendant in error on the motion to dismiss does not point out wherein the record fails to present the question of the constitutionality of the act.

The brief shows that the question was presented to the Common Pleas Court, to the Court of Appeals and to the Ohio Supreme Court, and we cannot conceive of a record which would present the Federal question more clearly.

In considering this case the court should understand that the parties at all stages of the case had in view the decision of the Supreme Court of Ohio in State ex rel. Yaple vs. Creamer, Treas., 85 O. S., 349, decided February 6, 1912, in which the court held that the act "is a valid exercise of legislative power not repugnant to the federal or state constitutions, or to any limitation contained in either."

Under the Ohio practice it is necessary to plead the defenses of assumed risk and contributory negligence. The defense of the fellow servant rule is raised by the defendant's denial. It is not proper to plead a legal conclusion such as the unconstitutionality of a law.

Upon the assumption that the law was a nullity, and that the provision thereof taking away an employer's defenses was of no force, the plaintiff in error pleaded the defenses of assumed risk and contributory negligence. The defendant in error did not attack these defenses by motion or demurrer.

In the trial of the case in the Common Pleas Court the validity of the act was raised for the first time when the plaintiff in error requested the court to charge the jury as to these defenses. Because of the decision in State ex rel. Yaple vs. Creamer, Treas., supra, the court refused to give these charges, and in its general charge instructed the jury:

> "that under the law of the State of Ohio that was in force and operation at the time of the injuries herein complained of * * * the defendant shall not avail itself of the following common law defenses, to wit, the defense of the fellow servant law, the defense of the assumption of risk, or the defense of contributory negligence."

The plaintiff in error presented the federal question at the first opportunity, and the court by its ruling affirmed the validity of the act. In its motion for a new trial the plaintiff in error specifically charged error in the ruling that the act did not violate the Federal Constitution.

In the petition in error to the Court of Appeals, (the intermediate court), and in the petition in error to the Supreme Court of Ohio, the plaintiff in error specifically charged error in the inferior courts in holding that the act did not violate the Federal Constitution.

In view of the decision of the Ohio Supreme Court in State ex rel. Yaple vs. Creamer, Treas., supra, that court in this case sustained a motion to affirm the judgment.

As appears in the transcript filed herein the Court of Appeals said:

> "As to the unconstitutionality of the Ohio Workmen's Compensation Law, while fully argued in his brief, counsel for plaintiff in error frankly stated that he expected no relief in this court. On this question we are bound by the decision of our highest

> state tribunal, which has decided this question in the case of State ex rel. v. Creamer, 85 O. S., 349."

The Ohio Supreme Court in its entry of affirmance held that the provisions of the act:

> "are valid and are not in violation of or repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

It will thus be seen that the plaintiff in error presented the question of whether the act violates the Federal Constitution—

First, in the Common Pleas Court at the trial of the case;

Second, in the motion for a new trial in the Common Pleas Court;

Third, by the petition in error to the Court of Appeals, and

Fourth, by the petition in error to the Supreme Court.

On each occasion the respective courts affirmed the constitutionality of the act.

As the attorneys for defendant in error do not point out wherein the record is deficient, and as we doubt whether many records have been filed in this court where the Federal question has been more clearly presented and determined, we do not deem it necessary to further discuss this branch of the motion. In fact from the failure of counsel for the defendant in error to discuss the question or cite authorities, we assume, they have no confidence in this branch of their motion and expect it to be overruled.

II.

THE MOTION TO AFFIRM.

This branch of the motion is filed under paragraph V of Rule VI, which provides that the court will receive a motion to affirm on the ground (a) "that it is manifest that the writ or appeal was taken for delay only," or (b) "that the questions on which the decision of the cause depend are so frivolous as not to need further argument."

(a) As it is not claimed that this proceeding was taken for delay, or that it was not filed in good faith, we need not discuss the point.

(b) Under this phase of the motion the court must find that the questions involved in this proceeding are "frivolous."

The proper application of the rule is stated in the opinion of the court through Mr. Chief Justice White, in Railroad Co. vs. Melton, 218 U. S., 36, 49, wherein he said:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been

> so explicitly foreclosed as to leave no room for contention on the subject and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations; (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employes actually engaged in the hazardous work of moving 50 trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

It is to be noted that in State ex rel. Yaple vs. Creamer, Treas., supra, Davis and Shauck, JJ., did not concur in the opinion.

Preceding an elaborate argument, covering numerous points and citing many cases to support the constitutionality of the act, counsel for defendant in error at page 11 of their brief say:

> "In discussing the constitutional question it is extremely difficult in the first instance to anticipate the objections which may be made to the law, and consequently, the law being presumed consti-

tutional, it would be more proper to present argument sustaining the law after the attack thereon had been made in a definite way."

We fully agree with this statement. Counsel apparently feel that "analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented." Therefore the question has not been "so explicitly foreclosed as to leave no room for contention on the subject and hence cause the question to be frivolous."

As was indicated in the arguments in the state courts we have eliminated all questions as to the validity of this act except the classification found therein. In other words in the state courts we have presented, and now desire to present the invalidity of this act upon the ground that the classification created by its terms was arbitrary and unreasonable, and violated the provisions of the Fourteenth Amendment to the Constitution of the United States.

The court will observe that this eliminates several of the points discussed by counsel for defendant in error.

Following a movement of wide extent which culminated in 1910 in the conference at Chicago of State Commissioners on Compensation for Industrial Accidents, the Ohio Commissioners appointed to consider this subject made their report in January, 1911, and the Ohio General Assembly passed the act involved in this case.

The act created a State Insurance Fund, as the result of payments by employers and employes, and provided the machinery by which the fund should be administered.

The legislative history of the act shows that it was the purpose of its promoters to make the act popular, and to accomplish this certain employers were excluded from its provisions.

Its operation was limited, as found in the following provisions (Sections 1465-57 and 1465-60 of the Ohio General Code):

> "Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, wherever occurring, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employe of his right of action as aforesaid." (Section 20-1.)

> "All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:

> "The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence." (Section 21-1.)

The act was termed elective but by reason of the penalties was in fact compulsory. By its terms, employes and employers in industries employing four or less were respectively deprived of its benefits, and relieved of its burdens, and in industries employing five or more, were respectively benefited and burdened.

Neither the employer nor employe in an industry employing four or less could take advantage of the act.

The purpose of the act is defined in its title:

> "An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards."

With reference to its history and purpose in State ex rel. Yaple vs. Creamer, Treas., supra, Johnson, J., said:

> "The statute in question provides for the creation of a State Liability Board of Awards, which shall establish a state insurance fund, from premiums paid by employers and employes in the manner provided in the act. It provides a plan of compensation for injuries, not wilfully self inflicted, resulting from accidents to employes of employers, both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent. respectively. It applies only where the employer has five or more operatives regularly in the same business or in or about the same establishment."
>
> . . . . . .
>
> "The law was passed after a report referred to in the briefs, of a commission appointed by the governor, in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws, which have been passed in the effort to improve such conditions. Substantially its conclusions are, that the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly un-

> sound, that there is an intelligent and widespread public sentiment which calls for its modification and improvement, and that the general welfare requires it. That there has been enormous waste under the present system, and that the action for personal injuries by employe against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written constitution to limit the legislative power, we in this country have the problem of devising a plan which shall not infringe the fundamental law."

It appears that we agree with counsel for defendant in error as to the purpose of the act, when they say (brief, p. 18):

> "Its object is to substitute for an inadequate, insufficient system, a newer and better theory, placing upon the industries of the state the burden of caring for those who are injured in the course of their employment. It keeps the injured and the dependents of the killed employe from becoming a burden on society."

The act had but one object, viz., to furnish a prompt and certain system of compensation to injured employes, in lieu of a system which was believed to be wasteful and uncertain in its benefits. The evils of the former system were found in all employments, and, if valid, the act should have applied to every employer and employe. The condition sought to be corrected existed in every industry, regardless of size and the number employed therein.

This court has frequently defined the general principles by which a proper classification may be made for legislative purposes, and without reviewing the numerous decisions we believe the rule is as stated by Mr. Justice McKenna in Billings vs. People of the State of Illinois, 188 U. S., 97, 102:

> "If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation."

In Connolly vs. Union Sewer Pipe Co., 184 U. S., 539, 560, Mr. Justice Harlan quoted with approval the following from Railway Co. v. Ellis, 165 U. S., 150:

> "For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

The words of Mr. Justice Holmes in Engel vs. O'Malley, 219 U. S., 128, 138, are apt:

> "It is true no doubt that where size is not an index, to an admitted evil, the law cannot discriminate between the great and the small."

The evil sought to be corrected by the Ohio act existed in every industry, large and small."

In Railway Co. vs. Ellis, 165 U. S., 150, 156, Mr. Justice Brewer quoted with approval the following from Stratton vs. Morris, 89 Tenn., 497:

> "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary."

We submit that in view of the purpose of the act the classification created by it is unreasonable and arbitrary.

In view of engagements made before the filing of this motion and of the short time at our disposal it is impossible for us to review and distinguish all of the cases cited by counsel nor to refer to but few of the cases upon which we rely. It is not our purpose to argue the merits, but we will discuss certain of the cases cited.

In Consolidated Coal Company vs. People of the State of Illinois, 185 U. S., 203, 208, the court sustained an Illinois coal mine inspection law because the classification therein provided was held to be within the purpose of the law, as is found in the following statement by Mr. Justice Brown:

> "In the case under consideration there is no attempt arbitrarily to select one mine for inspection,

but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here."

In McLean v. Arkansas, 211 U. S., 542, 552, the court sustained a law upon the ground that the regulation of coal mines therein provided was valid, and that the classification thereby created was proper as within the purpose of the law, as appears in the statement of Mr. Justice Day:

"It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare."

Counsel rely upon the decision in Quong Wing vs. Kirkendall, 223 U. S., 59, but this and other cases may be distinguished because a classification for taxation purposes is not governed by the same principles governing classifications for other purposes.

The state courts are not in accord as to the validity of the compensation laws passed in these states. We shall not at this time analyze these laws or discuss the

decisions as to their validity; but as counsel cite the case of Borgnis vs. Falk, 147 Wis., 327, we will show that this case is not in point, and perhaps illustrates the differences between the Ohio act and similar laws of other states.

The Wisconsin law does not create an insurance fund, and in its general scope and in details is essentially different from the Ohio act as was stated in Borgnis vs. Falk, supra:

> "It divides all private employers of labor into two classes: (1) those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of assumption of risk, and negligence of a co-employe from the second class (except that where there are less than four co-employes, the latter defense is not disturbed), but leaves both defenses intact to the first class."

Under the Ohio act only employes and employers in industries employing five or more were affected by its terms. The act gave to such employes a right of recovery which is almost absolute, because the defenses of assumed risk, fellow servant rule and contributory negligence rule were taken away. Such an employe might have recovered even though he were himself negligent.

As a result employers in industries employing four or less still had the advantage of these defenses, and employes in such industries could not recover if either defense existed.

Neither the legislative history nor the context of the Ohio act contains a suggestion that it had any purpose to provide for the safety of employes. Its sole purpose was to substitute one system of compensation for another. Considering its purpose the employes in every industry should have equal claim to its benefits.

If for the sake of the argument we admit there is a logical relation between the number of employes and the defenses of assumed risk and fellow-servant rule, it is clear that there is no such relation as to the defense of contributory negligence. This defense necessarily arises from the act of the individual employe. It is not in any way related to the number of coemployes or the size of the industry.

It results in an entirely arbitrary classification when an employe in an industry employing four or less may not recover if he is negligent, while an employe in an industry employing five or more may recover notwithstanding his negligence. Likewise the employers in the respective industries are arbitrarily benefited and burdened to the extent that the employe, if himself negligent, may or may not recover.

We submit that there are fundamental and detail distinctions between the Wisconsin law and the Ohio act, and that the decision of the Wisconsin court is of but little value in the consideration of the Ohio act.

We believe that the Ohio Workman's Compensation law has never been presented for the consideration of this court, and that but few if any of the general compensation laws passed in various states have been considered by this court. These laws have points of similarity with the Ohio act, but none of them is the same, either fundamentally or in detail.

We have discussed but a few of the points which should be considered when this case is submitted on the merits. While we believe the burden should be upon the defendant in error to bring himself within the letter of the rule, yet we have briefly referred to a few of the

points and cases and think it clearly appears that the issue is not frivolous, and that the questions made in this case have not been foreclosed by the decisions of this or other courts. The Ohio Supreme Court was not unanimous in affirming the validity of the Ohio act.

The issue involved herein is of great importance and we believe has real merit. We believe that some questions to be presented are novel. The proceeding is filed in good faith.

We submit that the importance of the issue and the meritoriousness of the questions entitle the plaintiff in error to the opportunity to fully present its case in brief and argument.

III.

THE MOTION TO ADVANCE.

The rules do not provide for the advancement of causes on account of the indigence of parties, and we are not aware of any practice on the subject. The situation of the defendant in error is not different from that of many parties in causes pending before this court. The court will note the affidavit of the defendant in error as to his condition and ability to work is dated June 25, 1914. The affidavit, copy of which is appended hereto, shows his apparent condition on September 18, 1914, and he was then apparently able to work and should not be an object of charity.

H. B. Arnold and
W. Wilson Carlile,
Attorneys for Plaintiff in Error.

Columbus, Ohio, Oct. 2, 1914.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1914.
No. 1101.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

Affidavit.

State of Ohio, Franklin County, ss.:

Rachel L. Kidwell, being first duly sworn, deposes and says she is a duly graduated nurse and has this day seen and talked with the defendant in error, Harry O. Blagg; that he has substantially recovered his normal general health; that all of the wounds resulting from his injuries have healed; that he expects to use an artificial leg; that he is able to and is doing wood working; that he is able to earn a livelihood at such work as a man with one leg would be able to do; and that he became twenty-one years of age in the month of July, 1914.

(Signed) Rachel L. Kidwell,

Sworn to and subscribed before me on this eighteenth day of September, 1914.

[Seal] (Signed) Edwin F. Hoover,
Notary Public, Franklin County, Ohio.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. B. Arnold and
W. Wilson Carlile,
Attorneys for Plaintiff in Error.

F. B. TOOTHAKER, Law Printer, 79-89 N. Third St., Columbus, O.

FILED
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error.

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING,
HIS NEXT FRIEND,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

H. B. Arnold and
W. Wilson Carlile,
Attorneys for Plaintiff in Error.

F. B. TOOTHAKER, Law Printer, 79-81 N. Third St., Columbus, O.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error.

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PLAINTIFF IN ERROR WAS DEPRIVED OF A SUBSTANTIAL RIGHT.

Plaintiff in error asserts the defenses of assumed risk, contributory negligence and fellow servant rule, and because of the Ohio Workmen's Compensation Act the Ohio courts held that it was not entitled to make these defenses. Plaintiff in error claims that the classification in the act is arbitrary and unreasonable, and that this holding was erroneous.

Defendant in error claims that the evidence offered at the trial of this case did not justify the submission of the defenses to the jury, and that consequently plaintiff in error has not been deprived of any right.

Plaintiff in error's contention regarding the unlawful classification found in the act is most forcibly seen in analyzing the defense of contributory negligence. The act provides that an employe working with three or less persons cannot recover if himself negligent while if working with four or more he may recover notwithstanding his own negligence, and it is to the unreasonableness of this classification that our argument has been and will be directed.

The decisions of this court in Plymouth Coal Company vs. Pennsylvania, 232 U. S., 531, and in other cases cited are to the effect that a party seeking to have an act declared invalid must show that he has been injured by the unconstitutional feature.

In the brief for the defendant in error it is contended that the defense of assumed risk set forth in the answer contains nothing but a legal conclusion. No objection was made to the form of this defense and the point was waived. We assert with entire confidence that this defense is a statement of ultimate facts and not of a legal conclusion.

The question whether the defense of contributory negligence should have been submitted to the jury must be considered in view of the fact that the so-called "scintilla rule" prevails in Ohio, and that an issue must be submitted to the jury if the evidence and all reasonable inferences from it **in any degree** tend to prove it.

Among the numerous decisions by the Ohio Supreme Court on this point are:

Work vs. State of Ohio, 2 O. S., 297.
Ellis vs. Trust Co., 4 O. S., 628, 644.
Dick vs. R. R. Co., 38 O. S., 389.
Street Ry. Co. vs. Snell, 54 O. S., 197.
Bank vs. Hayes, 64 O. S., 100, 101.

The cases cited were discussed at length and reaffirmed in the opinion rendered May 6, 1913, in the case of Gibbs vs. Village of Girard, 88 O. S., 34.

In the opinion it was said:

> "If negligence raises a proper issue for the determination of the jury, certainly contributory negligence must likewise raise a proper issue for the determination of the jury. It will not do to say that the negligence of the defendant was a question for the jury, but that the negligence of the plaintiff with respect to the same transaction, whether you call it contributory or not, was a question for the court. They both involve the question of want of ordinary care in the particular situation and both must be determined by substantially the same rules of evidence."

In that case the plaintiff sought to recover damages for an injury resulting from the alleged negligence of defendant in the care of its sidewalks. The opinion discusses the facts and the previous decisions of the court. The negligence of the plaintiff could only be inferred from the circumstances and from the direct evidence. The trial court directed a verdict for the defendant. The decision was reversed by the Supreme Court on the ground that this was an issue of fact to be submitted to the jury.

We find a decision upon facts strikingly analogous to those in the case at bar in Lewis vs. Railway Co., 89 O.

S., 9, decided October 21, 1913. In the syllabus of this case it was said:

> "The employe was twenty-one years old and he had never had any experience about railroad tracks or yards, and so informed the foreman when he was employed four days previous to his injury. The foreman exhibited to him the manner of attaching and using the pull-jack, but gave him no instruction as to the position he should take when operating the lever upon the pull-jack, and no warning that the cars might be suddenly jostled and started while he would be at work between them. He had thus worked with the pull-jack but two or three hours, and he was crouched down by the side of it between the tracks with one thigh upon the rail to which it was attached, when the car was suddenly bumped by others moving upon the track, and he was pinched under the wheel and injured."

Held:

> "It was for the jury to decide in the light of all the facts whether it was negligence on the part of the injured employe to sit upon the rail instead of taking a position more to the middle of the space between the tracks. Therefore it was error for the trial court at the conclusion of the plaintiff's evidence, to direct a verdict for the defendant company."

In the opinion is a statement of the respective contentions of the parties:

> "The defendant company contends that the plaintiff had sufficient age and maturity of judgment to understand the dangers incident to the nature and place of the work with a simple appliance, such as a pull-jack, after the method of the work had been exhibited to him; that the company had no reason to expect that he would place himself in a position so manifestly dangerous as the one he took upon the rail under a car in the yards, and therefore they were not required to place a flag or watchman at

that point to guard against a movement of the cars at the place where he was at work.

On the other hand, he said he had no apprehension of the danger because he had no knowledge of the methods of operations in railroad yards, but he supposed that the cars would remain stationary upon the tracks where men were placed to work about them with an instrument such as this, which required the efforts of two men to put it over the track rail, and, for that purpose at least, to place their bodies in part under the car and across the rail; and that the company should at least have warned him that the cars would be or might be suddenly put in motion upon the three parrallel tracks where he was sent to work."

The evidence in the case at bar discloses:

First, that the defendant in error placed himself in a dangerous position by going between the cars;

Second, that he could have gone around the bumper by a safe way at the west end of the cars;

Third, that he could have gone by a safe way around the cars at the east end; and

Fourth, that the foreman directed him to do certain work and when that was completed to go across the track, and that it was customary for the foreman to notify the switching crew or himself watch out for the safety of the employes while working across the track.

The plaintiff in error in violation of the instruction received by him crossed the track during the absence of the foreman, before he had finished the work to which he had been assigned, and crossed by the dangerous way between the cars rather than by the safe ways around the west and east ends of the cars.

This evidence will be found in the record, pp. 14, 15, 16, 17, 23, 30, 31, 37, 40, 41, 44, 45, 47.

Counsel for defendant in error dwell on the negligence and liability of the plaintiff in error. The negligence of the plaintiff in error is not at this time involved in the case. The question is whether there was the slightest evidence or any reasonably inferences to be drawn therefrom sustaining the issue of contributory negligence. The truth is there was direct evidence upon this issue in the four particulars stated above.

If the Common Pleas Court had directed a verdict for plaintiff in error, as was done in Gibbs vs. Village of Girard, supra, and Lewis vs. Railway Co., supra, it would have erred, because upon the record this issue should have been submitted to the jury. Conversely if the act was unconstitutional the court in the case at bar erred in charging that by reason of the act plaintiff in error's defenses were taken away.

THE CLASSIFICATION IN THE OHIO WORKMEN'S COMPENSATION ACT IS ARBITRARY AND UNREASONABLE.

Counsel for defendant in error confuse the **power to enact** a law and the **right to classify** thereunder. The plaintiff in error has not questioned the **power** of the General Assembly to enact a compensation law, but contends that, considering the purpose of the act and the condition to which it was intended to apply, there is an unreasonable and arbitrary **classification** when an employe working with three or less may not recover if negligent, while an employe working with four or more may recover if negligent.

Counsel also somewhat divert the argument by discussing the defenses of assumed risk and fellow servant

rule, although the plaintiff in error has based its argument upon the arbitrariness and unreasonableness of a classification which seeks to differentiate the right of a negligent employe to recover by reason of the number of employes engaged in an industry. The argument as to the defense of contributory negligence without doubt applies with much force to the defenses of assumed risk and fellow servant rule, but the argument herein has been and will be made as to a classification which limits and enlarges the right of an injured employe to recover if negligent, because of the number of employes.

Counsel do not disagree with us as to the purpose of the act nor as to the condition to which it was intended to apply. They tacitly admit that the condition was one existing in every relation of employer and employe. The court will not measure with mathematical nicety the limits of a class under some laws, and will not hold such laws invalid merely because there is a difference in degree in the condition to which a particular law applies. However, the argument which assumes that a classification by number is reasonable so far as the defenses of assumed risk and fellow servant rule are concerned does not apply to a classification which leaves employes injured as the result of their own negligence grouped, so that one group is burdened and the other group is benefited, while the condition is common to both groups and is not related to or affected by the number of employes.

We believe the court has always considered the **nature** of the particular act under consideration, the **condition** to which it was intended to apply, and the **effect** upon the individuals who may be classified by it.

In Connolly vs. Union Sewer Pipe Co., 184 U. S., 540 at page 558, Mr. Justice Harlan said:

> "The state has undoubtedly the power, by op propriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

To these fundamental objects of the police power should be added the "public welfare". It is under this that the act involved herein may be justified, because of the interest which the public has in assuring to an injured employe and his dependents prompt and certain compensation in the event of injury or death received in the course of his employment.

This act does not purport to control the conduct of the employer and employe; it seeks to remedy a condition found in all employments. It will be found that the cases relied upon by counsel for defendant in error involved classifications under taxing laws and classifications under laws which are repressive or prohibitive.

Among the cases where a wide latitude for classification is sustained because they are passed in the exercise of the taxing power are Quong Wing vs. Kirkendall, 223 U. S., 59; Magoun vs. Bank, 170 U. S., 283, and Citizens Telephone Co vs. Fuller, 229 U. S., 322.

An examination of the opinions in these cases discloses that the power to classify for taxing purposes is necessarily broad, and that a state may classify and exempt for taxation purposes "so long as they proceed within reasonable limits and general usage". Mr. Justice McKenna in Magoun vs. Bank, supra.

In Quong Wing vs. Kirkendall, supra, Mr. Justice Holmes said:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."

and again

> "It may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary * * * ."

In Citizens Telephone Co. vs. Fuller, supra, Mr. Justice McKenna said:

> "It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation."

The power to classify for taxing purposes is broader than for other purposes, and these cases should not be accepted as precedents in the discussion of the act under consideration.

It is a trite saying that there can be no taxing scheme without inequalities and discriminations. Such laws are political, and are often controlled by questions of expediency and practicability. Taxing laws almost universally recognize the exemption of homesteads, churches and property used for benevolent and charitable purposes. They frequently exempt property used for a purpose which tends to promote the public welfare, such as for manufacturing. They exempt government, state and municipal bonds, and treat tangible property differently from intangible property and credits. They tax franchises and earnings by rules different from those applied to other property. In short taxing laws for suf-

ficient reasons and by common usage may be and properly should be applied to their objects without a rigid rule of equality.

Other cases cited by defendant in error may be grouped under the power to repress and control methods and practices in businesses and industries, of which laws providing for the safety of employes are an example.

In this group will be found: Railway Co. vs. New York, 165 U. S., 628; Coal Company vs. Illinois, 185 U. S., 203; McLean vs. Arkansas, 211 U. S., 539; Engel vs. O'Malley, 219 U. S., 128; Railway Company vs. McGuire, 219 U. S., 549; Lindsley vs. Carbonic Gas Co., 220 U. S., 61; Mondou vs. Railroad Co., 223 U. S., 1; Barrett vs. Indiana, 229 U. S., 26; Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531.

In Railway Company vs. New York, supra, Mr. Justice Harlan at page 633 said:

> "No doubt the main object of the statute was to provide for the safety of passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are greater than on short, local lines. But as suggested in argument, a road only 50 miles in length would seldom have a sleeping car attached to its trains; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision."

In Coal Co. vs. Illinois, supra, Mr. Justice Brown at page 208 said:

> "In the case under consideration there is no attempt arbitrarily to select one mine for inspection,

but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases."

In McLean vs. Arkansas, supra, Mr. Justice Day, at page 551, quoted with approval Coal Co. vs. Illinois, and at page 552 said:

"It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare."

In Engel vs. O'Malley, supra, at page 138 Mr. Justice Holmes said:

"It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and small, but in this case size is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect."

In Railway Co. vs. McGuire, supra, in sustaining the Iowa law defining the liability of railway corporations

for injuries received by employes, Mr. Justice Hughes, page 574, said:

> "It was, however, entirely competent for the legislature, in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose."

In Mondou vs. Railroad Co., supra, Mr. Justice Van Devanter, pages 48 and 49, said:

> "In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress in the exertion of its power, over interstate commerce, may regulate the relations of common carriers by railroad and their employes, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged."

In Barrett vs. Indiana, supra, Mr. Justice Day said, page 30:

> "It is not unlikely that there is in fact a difference in the degree of danger in mining the two kinds of coal. We at least cannot say the contrary. If so, it must be presumed that the legislature informed itself upon that subject."

In Plymouth Coal Co. vs. Pennsylvania, supra, Mr. Justice Pitney said:

> "That the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power is entirely settled."

It is not necessary under repressive or prohibitive laws that they should operate with rigid impartiality and absolute equality. Oftentimes to make them fit with "mathematical nicety" every conceivable situation would make them impracticable and would destroy their usefulness. Practical considerations suggest that the legislature, knowing the evil which is to be removed or controlled, should have considerable discretion in defining those to whom such laws shall apply.

The brief reference to the cases involving classifications under taxing and repressive or prohibitive laws show there are reasons, related to the purposes and operation of such laws, why there need not be a rigid equality under the classifications found in them.

A different rule should be applied to the act involved in the case at bar. This act is of a social and economic nature. It came as the result of a great agitation—one of the strongest social movements since the abolition of slavery. The movement was world wide. It stirred the deepest feelings of interest and sympathy, and brought the most conservative to its support. Its benevolent purpose was to relieve the needs and misfortunes of the injured employe and his dependents, and thereby subserve the public welfare. The condition sought to be changed was everywhere present in the relation of employer and employe—and everywhere in the same form. Why should not the act be all-inclusive? There are no questions of expediency or practicability involved. When the General Assembly undertook to shape a mantle of charity with which to cover the patient who had so aroused the public sympathy why should it have left the hands and feet to freeze and suffer, while it pro-

tected the body? Is the employe in the small industry less deserving and has the public less sympathy for him than the employe in the larger industry? It was a niggardly benevolence that refused its benefits to the employe working with three or less by a classification having no more substantial basis than that found in the act.

It requires some stretch of the imagination to say that the number of employes or the size of the industry has anything to do with the care which an employe will exercise for his own safety. It does not appear in the common experience. The General Assembly had no more knowledge or information on this point than the court now has. It is almost impossible to conceive that the ordinarily careful employe would not exercise the same degree of care in one situation as in the other. If his negligence contributes to his injury it is due to conditions which he himself controls, and not to the conditions under which he works or which surround him. There is no real distinction in the situation of the employe injured as a result of his own negligence, arising from the size of the industry or number of co-employes. Any such differentiation is purely fanciful. It has no real foundation. Having the great purpose to relieve the want and suffering of injured employes the act not only deprives of its benefits the man working with three, but actually places him in a worse position to recover damages from his employer than if he were working with four.

Counsel refer to Borgnis vs. Falk, 147 Wis., 327. Contributory negligence is not a feature of the classification in the Wisconsin law. Chief Justice Winslow said that

so far as the defenses of assumed risk and fellow servant rule are concerned there is a relation between them and the size of the industry and number of employes, but he was not called upon and did not say this as to contributory negligence.

Counsel do not question the view expressed in our opening brief that the act had but one purpose, viz., to substitute for a system of compensation that was assumed to be wasteful and uncertain in its benefits, a system that would furnish prompt and certain benefits. A system which ethically and economically would be conducive to the public welfare and to the employe.

Having in view this purpose, and that the condition to which the act was intended to apply existed in every relation of employer and employe, we submit that a classification which seeks to differentiate the situation of the negligent employe by the number of co-employes is arbitrary and unreasonable, and discriminates against the employe working with three or less and the employer employing four or more, and that such employe and employer do not have the equal protection guaranteed to them by the 14th Amendment.

Respectfully submitted,

H. B. Arnold and
W. Wilson Carlile,
Attorneys for Plaintiff in Error.

Columbus, Ohio, November 28, 1914.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 511.

THE JEFFREY MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

HARRY O. BLAGG, BY JOSEPH M. DOWNING, HIS NEXT FRIEND,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This case was tried in the Court of Common Pleas of Franklin county, Ohio, and a verdict returned in favor of the defendant in error in the sum of twenty-five thousand ($25,000) dollars. The Common Pleas Court reduced the verdict to the sum of sixteen thousand ($16,000) dollars, and entered judgment therefor. The Court of Appeals affirmed this judgment. Error was prosecuted to the Supreme Court of Ohio upon the ground that the Workmen's Compensation Bill, found in the brief for plaintiff in error, page 46, is unconstitutional, the con-

tention being that the said act contravenes the Fourteenth Amendment to the Constitution of the United States in that the classification of employers and employes created by the act is arbitrary and unreasonable.

The Supreme Court of Ohio, relying upon State ex rel. vs. Creamer, Treasurer, 85 O. S., 349, affirmed the judgment of the lower courts, on motion.

The plaintiff in error now brings the case to this court for review, and frankly states upon page 13 of its brief that:

> "The sole question presented is whether the Ohio Workmen's Compensation Act contravenes the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the classification of employers and employes created by the act is arbitrary and unreasonable."

THERE IS NO FEDERAL QUESTION PRESENTED.

The defendant in error claims that the plaintiff in error must first show, before it may have the question above suggested presented to this court for review, that the alleged unconstitutional feature of said act injures it and so operates **in the case at bar** as to deprive it of rights protected by the Fourteenth Amendment. This proposition has been frequently decided by this court, the latest announcement being by Mr. Justice Pitney, in Plymouth Coal Company vs. Pennsylvania, 232 U. S., 532, citing Railway Company v. King, 217 U. S., 524, 537; Food Company v. Wright, 225 U. S., 540, 550; and Rosenthal v. New York, 226 U. S., 260, 271.

The plaintiff in error claims it was not permitted by the trial court to avail itself of the defenses commonly known as negligence of a fellow servant, assumed risk, and contributory negligence.

The Jeffrey Manufacturing Company for its alleged first defense says:

> "Defendant for its first defense herein says that all of the circumstances and conditions surrounding plaintiff at the time of his said injury were all well known to him or by the exercise of reasonable and ordinary care would have been known to him and were incident to his employment, and the risks of injury therefrom or thereby were assumed by him."

The alleged second defense is as follows:

> "Defendant for its second defense herein denies that it was guilty of any negligence or carelessness and says that if it were negligent in any of the respects alleged in said petition the plaintiff himself was guilty of negligence which directly contributed to and was the direct and proximate cause of his said injury, in that he knew or by the exercise of reasonable and ordinary care ought to have known the danger of crossing the switch between said cars, and that with said knowledge or that knowledge which by the exercise of due care he would have had the said plaintiff negligently and carelessly crossed said track between said cars and was injured as the result of his own carelessness and failure to use due care in the premises."

On page twelve of the brief for plaintiff in error, it is said that under Ohio practice, it is necessary to plead the defenses of assumed risk and contributory negligence. We insist that the alleged first defense of so-called assumed risk amounts to nothing more than a **legal conclusion**, and that there is no evidence whatever even tending to prove any of the allegations of the alleged first and second defenses, or that Blagg was injured as the result of the negligence of a fellow servant.

Therefore, if this be true, the record presents merely an abstract question touching the constitutionality of

the Workmen's Compensation Bill in the respect above mentioned, and The Jeffrey Manufacturing Company was injured in no respect by the judgment of the trial court in eliminating from the consideration of the jury the said three alleged defenses, all of which were totally unsupported by any evidence.

This brings us to a consideration of the facts and evidence disclosed by the record, all of which is printed, excepting that portion which relates only to the extent of the injuries. The record shows that Blagg at the time of his injury, to wit, June 9, 1912, was nineteen years of age; that The Jeffrey Manufacturing Company was engaged in operating a large manufacturing plant and had not complied with the Workmen's Compensation Law; and that in the conduct of its business the company used many buildings and many acres of land. On the south side of the grounds of the company was a railroad track or switch used for the purpose of storing cars. This would hold eight ordinary freight cars, and no more, when said cars were crowded closely together. At the time Blagg was injured, there were seven freight cars standing upon the switch and between the fourth and fifth cars the company, according to its custom, had left an opening of about three or four feet for the use of the employes of the company that might have occasion to pass between the ends of the cars when engaged in the performance of their duties. Between the switch and the fence on the south side of the lands (a narrow strip of ground), were two piles of lumber. Blagg was employed by the Company as a common laborer in cleaning up the yards, removing rubbish, and the like. He was directed by his foreman

(Coleman) to remove the lumber between the fence on the south side of the lands and the switch, and in so doing, he was required to pass through the said opening between the cars and to carry the lumber to a point north of the switch. While he was following these instructions, and while he was engaged in said labor, and as he was carrying a load of lumber out from behind the switch, and when he was between the cars, the man employed by the Company and in charge of the switching crew, caused a long cut of cars pushed by an engine to run against the car standing on the east end of the switch, with the result that the seven cars on the switch were jammed and pushed together, and Blagg was caught about the hips and between the ends of the fourth and fifth cars, and horribly injured. The record shows that it was the custom of the Company, as Blagg well knew, to leave the opening between the cars stored on the switch for the use of employes like himself, and it is admitted by the answer that the conductor, or man in charge of the moving of the cars, did not, and in fact could not, from the position he was required to occupy in performing his duties practically unaided, give any signal or notice of his intention to close this opening, or to run said cut of cars upon the east end of the switch.

Indeed, one ground of negligence is that the Company had an insufficient number of men engaged in the handling and switching of the cut of cars. The track upon which the storage switch entered curves to the north a few yards east of the east end of the switch, and although Blagg, before he passed between the cars with his load of lumber, looked and listened, he was unable to see the approaching cut of cars, and did not know

that they were coming. The Company provided but one man on its engine or locomotive, and one other man engaged in operating and in supervising the movement of cars in its railroad department, whose duty it was to control the movement of the cars, give the necessary signals to the engineer running the locomotive, make the necessary couplings or uncouplings of cars, watch the tracks on which the cars were moving, give warning to those who might be in danger of injury by the movement of the cars, and do any and all other things incident to the control or movement of cars through the yards of the Company.

There is no dispute about the instructions given Blagg by his foreman. Coleman, the foreman, testified upon that subject as follows:

> "About two o'clock, I told the men to finish cleaning up the shed and then carry a few pieces of old corrugated iron up to a pile west of the shed, and then we will go over to the Kilbourne & Jacobs fence and get this stuff in front of Kilbourne's fence."

By this, the foreman meant that Blagg, and the two men working with him, should carry out the lumber between the south fence and the switch, and this instruction was being followed by Blagg when he was caught between the cars.

Coleman, the foreman, left these men after having given this instruction, and did not return until after Blagg had been injured. It was intimated by the defendant below that Coleman should have notified the man in charge of the switching crew of the instructions given to Blagg and his associates, so that this man could have assured himself that no one was between the cars

when he pushed the cut into the switch. We think there is little consolation for the Company in this point, in view of the undisputed evidence to the effect that its employes were taught to believe that such openings between the cars stored on the switch were left for their use. But even if this was negligence on the part of Coleman, it was not negligence of a fellow-servant of Blagg, because Coleman was the superior of and in control of Blagg.

The man in charge of the switching crew was negligent in pushing the cut of cars upon the switch without any warning or notice and without investigating or going ahead or sending some one ahead to see that the track was clear. This man was not a fellow servant of Blagg, because he was in charge of another department of the Company's works, and was himself a boss or superior servant in that department.

The jury found that the Company was likewise negligent in having an insufficient number of men or employes engaged in the handling and switching of cars.

This negligence was directly chargeable as a matter of course to some superior officer of the Company, and not to any fellow servant of Blagg, who was only a common laborer in the yards.

This being beyond dispute the state of the record in this case, we insist that there is no evidence even tending to prove any negligence on Blagg's part, contributory or otherwise; or that the negligence resulting in Blagg's injury was that of a fellow servant; or that there was any assumption of risk on Blagg's part.

This being true, The Jeffrey Manufacturing Company was deprived of no rights whatever when the trial court

said in substance to the jury that the Company could not avail itself of the alleged defenses above mentioned. The court should have so instructed the jury in the absence of the Workmen's Compensation Act.

The knowledge that Blagg had of the custom of the Company in leaving the opening between the cars and the direction of his foreman to do work which necessitated passing between the cars was such an assurance as would justify him in undertaking the work in reliance upon the knowledge of the Company, without being liable to any charge of negligence in so doing, the danger in passing between the cars not being so imminent or manifest as to prevent him from using the opening; and this is certainly true when one in direct authority over Blagg ordered him to do just what he did.

Engine Co. v. Schelies, 61 O. S., 307.

The negligence of The Jeffrey Manufacturing Company in this case was gross in character, and even though it may be claimed by the Company that the opening between the cars was a dangerous place, still under the common law, Blagg was not deprived of his right to recover by the fact that the place was apparently dangerous, if a person of ordinary prudence, under the circumstances, would have obeyed the order of the foreman, as Blagg did.

Engine Co. v. Schelies, 61 O. S., 298.
Stone Co. v. Kraft, 31 O. S., 287.
Railroad Co. v. Krouse, 30 O. S., 222.

In the Schelies case, above referred to, the court quotes with approval from the opinion in **Keegan v. Kavanaugh,** 62 Mo., 230, wherein it is said:

> "The law remembers that the respective situations of the master and servant are unequal, and excuses the servant for deferring to the superior judgment of the master. If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the laws will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even when, like the servant, he was not free to choose."

The record in this case shows that Blagg did only what he was directed to do, and in the ordinary and usual manner. Certainly, a reasonably prudent man would have done the same thing, and in the same manner. Indeed, Blagg used extraordinary care, because before he started back with the load of lumber on his shoulder, and before he passed between the cars, he looked and listened, but was unable to see any approaching cut. All of these facts are undisputed. We think therefore it is clear that the record presents no evidence whatever of contributory negligence.

Upon the question of assumed risk, we again refer to the law of Ohio as settled in the Schelies case, supra, and therein stated as follows:

> "A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident."

The law of Ohio is settled by abundant decisions to the effect that the servant assumes only the risk of such injuries as are incident to the nature of the employment, and against which the master could not, in the exercise of ordinary care, have protected him.

Coal Co. v. Norman, 49 O. S., 605.
Columbus, etc., v. Webb, 12 O. S., 495.
Coal Co. v. Estievenard, 53 O. S., 43.
Hesse v. Railway Co., 58 O. S., 167.
Railway v. Ranney, 37 O. S., 669.
Railway Co. v. Leach, 41 O. S., 391.

We have clearly shown that the negligence of the Company was entirely negligence of the employes and officers superior in rank to Blagg. The Ohio authorities are to the point that the test to be applied in determining whether a particular servant is a superior or fellow servant merely is whether or not he has been placed by the master in a position of control or authority over his fellow employes, and does not depend upon the nature or character of the work which he is engaged in performing.

Kelly Island Co. v. Pachuta, 69 O. S., 468.
Railroad Co. v. Knittal, 33 O. S., 468.

Therefore no federal question is presented upon the record and the writ of error should be dismissed, and the judgment affirmed, because "one who would strike down a state statute as violative of the federal constitution must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him and so operates as to deprive him of rights protected by the federal constitution."

Plymouth Coal Co. v. Pennsylvania, 232 U. S., 532.

THE CLASSIFICATION PROVIDED FOR IN THE OHIO WORKMEN'S COMPENSATION ACT IS REASONABLE, AND THE LAW DOES NOT CONTRAVENE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is argued that the classification of industries by the number of employes so as to include those employing five or more and to exclude those employing less is such arbitrary discrimination as to deny to those coming within the purview of the statute the equal protection of the laws. This contention seems to be based upon the fact that in those cases excluded from the operation of the statute the employer can set up the defenses of assumption of risk, contributory negligence and the fellow servant rule, while in the other class the employe can recover if injured through the negligence of an uninsured employer. In other words it seems that the burden of the complaint is that the classification is unjust, arbitrary and unlawful when considered with reference to its application to these classes of defenses. We think that under the former decisions of this court, which have been fully set out in our brief on the motion to affirm, the question here made has been completely foreclosed. An epitome of the rules governing classification is to be found in **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S., 61, 78. The cases are there digested and the correct doctrine clearly explained. The test laid down for determination of the validity of classification may be thus stated: the Fourteenth Amendment

does not take from the state the power to classify, but admits of the exercise of a wide scope of discretion rendering illegal only that which it does without reasonable basis. If there be a reasonable foundation for the classification, the constitution is not infringed merely because such classification was not made with mathematical nicety or may in practice result in some inequality. Should any state of facts reasonably be conceived that would sustain the law, the existence of that state of facts must be assumed and he, who assails the statute, has imposed upon him the burden of showing that it is unreasonable and arbitrary.

A labored effort is made to show that there is no substantial difference between the employer of five or more workmen and him who hires less than that number. Now of course it is true that in any classification based upon size or number there will be slight difference as the line of demarcation is approached, but this has never been held to be *per se* an objection to such a basis of distinction. It has often arisen in instances where municipalities are divided into cities and villages. There the classification is upon population, yet there cannot be a very great difference between the city of ten thousand and a village of nine thousand nine hundred and ninety-nine, and yet such classification is uniformly sustained.

The Supreme Court of Wisconsin in **Borgnis v. Falk Co.**, 147 Wis., 327, fully recognizes and completely answers all argument that may be adduced in criticism of the adoption of size as a criterion for legislation. It is there held that the question is not whether there may be some on one side of the line whose situation is the same as that of some on the other side, but rather

whether there is a distinction between the classes as classes—whether there are characteristics which in a greater degree persist in the one than in the other, justifying the legal discrimination between them. This court has repeatedly followed the same doctrine.

The case of **Coal Co. v. Illinois**, 185 U. S., 203, sustained a classification of coal mines by which those, wherein not more than five were employed, were exempted from the operation of a statute providing for the appointment of a state mine inspector. This was held to be neither arbitrary nor unreasonable, in that the precautions necessary in the operation of the mines of ordinary magnitude would not be required where there were only five men employed.

In **McLean v. Arkansas**, 211 U. S., 539, a law applicable to mines employing more than ten men under ground was upheld, upon the theory that the statute was presumed practically to regulate the industry when conducted on any considerable scale.

Plymouth Coal Co. v. Pennsylvania, 232 U. S., 531, 539, upholds a law applicable to mines employing ten or more men; and this form of classification was not questioned by distinguished counsel who contested the validity of the law.

It is insisted, however, that the object of the act is to furnish a prompt and certain method of compensation to injured employes in lieu of that which was wasteful and uncertain, and that the right of the employe to receive compensation is just as sacred whether he was employed with three or a hundred—that the public is interested in having every injured employe compensated, and its interest is in no way affected by the size of the

industry. The corollary derived from this seems to be that the evils of the condition to which the act was intended to apply had no relation to the size of the industry. This may or may not be a criticism of the policy or wisdom of the law, but it most assuredly is no argument against its constitutional validity. With the folly or wisdom of legal enactments the judiciary has no concern. The sole question for it is whether there is power to enact a law. If such power exists then the court can go no further than so to hold.

One of the leading decisions upon the main question is that of **Quong Wing v. Kirkendall**, 223 U. S., 59. There steam laundries and women engaged in the laundry business where not more than two women were employed were exempt from a license tax imposed by a Montana statute. The court held that this did not deny the equal protection of the laws to one operating a hand laundry. It seems to be conceded that this case would be applicable if it were not a taxing measure, but an attempt has been made to distinguish it upon the ground that discrimination is permissible in matters of taxation, which would not be allowed in a police regulation. Counsel have overlooked the fact that a license law may be a police regulation. An examination of this decision will show that its reasoning completely eliminates the alleged distinction in that the opinion cites and relies upon cases which were purely police regulations. For illustration, we respectfully refer the court to the citations appearing on pages 62 and 63.

Citizens Telephone Co. v. Fuller, 229 U. S., 322, also illustrates this doctrine. A statute exempting property of telephone companies whose gross receipts do not

exceed $500 from the ad valorem tax, was held not to render the statute invalid as denying the equal protection of the laws. It is true that in this case it is said that in taxation there is a broader power of classification than in some other exercises of legislation, but it will be observed that the cases involving classification for police regulation are cited in the opinion. See page 330.

At the risk of repetition we wish to say that if there be reasonable grounds for the distinction, classification is proper and legislation providing therefor is valid if it applies to all alike within the class:

New York, etc., Co. v. New York, 165 U. S., 628.
Magoon v. Trust Co., 170 U. S., 283.
Barrett v. Indiana, 229 U. S., 26.
Chicago, etc., Co. v. McGuire, 219 U. S., 549.
Engel v. O'Malley, 219 U. S., 128.
Mondau v. New York, etc., Ry., 223 U. S., 1.
Mattheson v. Minneapolis, etc., Co., 148 N. W., 71.

See also brief of defendant in error on motion to affirm judgment in this cause.

Not only has the plaintiff in error failed to carry the burden of showing that this exception is unreasonable, but, on the contrary, the argument of counsel really tends to show that this classification is proper and fair, rather than fictitious, arbitrary, fanciful or illusory. This is apparent when we remember that the sole cause of complaint seems to be the removal of common law defenses. Any historical analysis of the doctrines of assumption of risk, contributory negligence and fellow servant will immediately disclose that these theories were inserted in the law of master and servant at a time when the industrial conditions now existing were unknown. Each master had but few employes, he came

more directly into contact with them, each knew his co-worker, was aware of the effect of his negligence, and there were no such ramifications of the results of such negligence as exist at the present time. The machinery was simpler and less dangerous. In the small factory and business of today where few men are employed, the complex and dangerous machinery in use in the larger concern is not in operation. The employe has better and more ample opportunity of taking care of himself. He is less liable to injury from momentary inadvertence. In a word, the risks of employment are less and the opportunity of avoiding them are better, as has very well been stated by Chief Justice Winslow in **Borgnis v. Falk Co. supra.** Counsel for plaintiff in error state that the Wisconsin law is essentially different from the Ohio act, and therefore the foregoing decision is not applicable. While it is true that the Wisconsin law is different in some respects, there can be no essential difference in its theory of classification. Whether the law calls for compulsory insurance or employers' liability is wholly immaterial when we come to consider the class to which it shall be applicable. Counsel state that they do not see wherein the greater or less risk in employment should take from the injured employe the right of compensation—that there is no relation between the right to expect compensation and the risks of the business. Failure properly to appreciate the fact that the injured employe in the small concern should have to some extent placed upon him the responsibility for his own negligence or the negligence of his fellow servant, **because of the fact that he is thoroughly familiar with all of the conditions and surroundings and has the means of know-**

ing and appreciating the dangers which he encounters has bred confusion in the minds of counsel. It was the theory of the General Assembly that the public policy of the State of Ohio required the payment of compensation to those who were injured in the course of their employment under such conditions as to render the defenses of contributory negligence, assumption of risk and fellow servant obnoxious to the welfare of the state. These conditions arose from complicated machinery, numerous employes and the peculiarly dangerous conditions surrounding the larger concerns which were not apparent in those industries employing few men. The line of demarcation was in the judgment of the General Assembly a proper one. The members of this body had before them all of the circumstances under which the various businesses of the state were conducted, and in the exercise of their discretion adopted this method of classification. They, no doubt, came to the conclusion that the dangers incident to those employments wherein five or more workmen were engaged, were different from those wherein less than this number was engaged. **The employer of few workmen did not come within the mischief and evils this law was designed to remedy and prevent.** Sound reasoning seems clearly to support this view.

Many cases are cited in the brief of plaintiff in error disclosing the unconstitutionality of certain forms of classification, but an analysis of these decisions will show that they are not in point upon the question we are now discussing, except in so far as they sustain the general rule laid down in the case of **Lindsley v. Carbonic Gas Co., supra.**

Statutes placing one or more persons or corporations in a class in which they do not economically, financially or legally belong are invariably declared invalid, and, of course, every student of constitutional law admits that there can be no arbitrary class legislation, but it must be borne in mind that we have no such instance here, but, on the contrary, are presenting to this court a law which in theory has been heretofore upheld in the cases which we have cited, and which calls for a reasonable classification and one demanded by the exigencies of the situation.

In view of the fact that in our judgment the whole matter has been foreclosed by former decisions of this court, we shall not devote further time to a discussion of the principles involved. Additional authorities supporting our view will be found in the brief on motion to affirm judgment.

In conclusion we wish respectfully to call attention of the court to the fact that plaintiffs in error now rely solely upon the question of class legislation so that it will be unnecessary to discuss any other phases of the question than those here presented.

Respectfully submitted,

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